(1) Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NAVEGAR, INC., *d/b/a* INTRATEC,
and
PENN ARMS, INC.,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 18 U.S.C. § 922(v)(1) exceeds Congress' power under the Commerce Clause?

PARTIES TO PROCEEDING

All parties to the proceeding are identified in the caption.

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The Order denying the Petition for Rehearing *en banc* is printed in the Appendix ("App.") at App. 86a. The Opinion of the Court of Appeals is reported at 192 F.3d 1050 (D.C. Cir. 1999) and is at App. 1a. The Order and Memorandum Opinion of the District Court are at App. 39a.

JURISDICTION

The Court of Appeals decided the appeal on October 8, 1999 and denied the Petition for Rehearing *en banc* on January 25, 2000. Chief Justice Rehnquist extended until May 24, 2000 the time within which to file this petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE

U.S. Const., Art. I, § 8, cl. 3: "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ."

18 U.S.C. § 922(v)(1): "It shall be unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon."

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

On March 3, 1995, Navegar, Inc. *d/b/a* Intratec (hereinafter "Intratec") and Penn Arms, Inc. (hereinafter "Penn Arms") filed a Complaint in the district court for a declaratory judgment seeking a declaration that § 922(v)(1) is unconstitutional as beyond Congress' powers under Art. I, § 8 of the United States Constitution and that § 921(a)(30)(A)(viii) and (ix), in combination with § 922(v)(1), are Bills of Attainder prohibited by Art. I, § 9 of the United States Constitution. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. The United States timely answered on July 3, 1995.

On July 14, 1995, the United States filed a Motion for Judgment on the Pleadings or for Summary Judgment on the Question of Jurisdiction, arguing only that Intratec and Penn Arms did not have standing. On September 6, Intratec and Penn Arms filed a First Amended Complaint, followed by the United States' amended answer on September 11. Intratec and Penn Arms filed an opposition to the United States' motion on September 25. Following discovery by the United States, the parties filed a Joint Stipulation of Fact on November 11. After additional briefing, the district court heard oral argument on the United States' motion on November 20. On February 1, 1996, the District Court issued a Memorandum and Order granting the United States' motion and dismissing the case. The decision of the District Court is reported at 914 F.Supp. 632 (D.D.C. 1996).

On appeal, the Court of Appeals reversed the district

court in part and affirmed in part. 103 F.3d 994 (D.C. Cir. 1997). On remand, Intratec and Penn Arms filed a motion for summary judgment, as did the United States. On August 31, 1998, the district court granted the motion of the United States, denied the motion of Intratec and Penn Arms, and dismissed the case with prejudice.

On appeal, the Court of Appeals affirmed the district court. 192 F.3d 1050 (D.C. Cir. 1999). A timely petition for rehearing *en banc* was denied on January 25, 2000; Circuit Judge Sentelle dissented and would have granted the petition.

On April 18, 2000, Chief Justice Rehnquist extended until May 24, 2000 the time within which to file this petition.

Statement of Facts

Navegar, Inc. is a Florida corporation doing business as Intratec. It is licensed by the Bureau of Alcohol, Tobacco & Firearms (BATF) to manufacture firearms. Prior to the effective date of § 922(v)(1) -- September 13, 1994 -- Intratec manufactured, pursuant to its federal license, firearms identified as TEC DC-9, a nine millimeter, semiautomatic pistol, and TEC 22, a .22 caliber, semiautomatic pistol. These pistols are "semiautomatic assault weapons" as that term is used in § 922(v)(1). No other person manufactured firearms identified as Intratec TEC DC-9 and TEC 22.

Penn Arms is a Pennsylvania corporation licensed by the BATF to manufacture firearms. Prior to the effective date of § 922(v)(1), Penn Arms manufactured, pursuant to its federal

license, shotguns identified as Striker 12, Striker 12S, Striker 12E, and Striker 12SE. These shotguns are "semiautomatic assault weapons" as that term is used in § 922(v)(1). As of the effective date of § 922(v)(1), Penn Arms was the only person which manufactured shotguns identified as Striker 12, Striker 12S, Striker 12E, and Striker 12SE.

SUMMARY OF ARGUMENT

I. Under this Court's decisions in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624 (1995) and *Brzonkala v. Morrison*, No. 99-29 (5/15/00), an intrastate activity must be economic to be regulated by Congress pursuant to the Commerce Clause. The Court of Appeals failed to apply that mandate to its review of the constitutionality of § 922(v)(1) and thus erroneously concluded that § 922(v)(1) was a valid exercise of Congress' Commerce Clause power.

II. The Court of Appeals failed to make an independent evaluation of the constitutionality of § 922(v)(1) as required by *Lopez*, instead applying a rational basis test. Moreover, the evidence which the Court of Appeals concluded provided Congress a basis for enacting § 922(v)(1) does not provide such a basis under *Lopez* and pre-*Lopez* case law.

ARGUMENT

I. THE COURT OF APPEALS' HOLDING THAT A REGULATED INTRASTATE ACTIVITY NEED NOT BE ECONOMIC CONFLICTS WITH THIS COURT'S DECISIONS IN *LOPEZ* AND *BRZONKALA*

The Court of Appeals concluded "that a 'regulated activity . . . need not be commercial, so long as its effect on interstate commerce is substantial.' *Terry v. Reno*, 101 F.3d 1412, 1417 (D.C. Cir. 1996)." 192 F.3d at 1056.[1] As support for this conclusion, the Court of Appeals relied not only on its prior decision in *Terry*, but on a single sentence in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624 (1995), which did not include either the word "economic" or "commercial": "the proper test requires an analysis of whether the regulated activity 'substantially affects interstate commerce." 514 U.S. at 559, 115 S.Ct. at 1630.[2]

Lopez did not hold that regulated activity need not be commercial. Rather, this Court unmistakably emphasized that

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[1] This conclusion resulted from "counsel['s] conce[ssion] at oral argument [that] Congress has authority to regulate *'activities'* that substantially affect interstate commerce.' *Lopez*, 115 S.Ct. at 1630 (emphasis added)." *Terry*, 101 F.3d at 1417. Counsel in *Terry* erred in making such a concession. See n.2.

[2] In this part of the its opinion, this Court was not analyzing whether an intrastate activity had to be "economic" or "commercial" to be subject to congressional regulation. Rather, this Court was concerned solely with whether "an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate under the Commerce Clause." 514 U.S. at 559, 115 S.Ct. at 1630.

such activities must be "economic" or "commercial" to be subject to congressional regulation: "[W]e have upheld a wide variety of congressional Acts regulating intrastate ***economic*** activity where we have concluded that the activity substantially affected interstate commerce." (emphasis added) 514 U.S. at 559, 115 S.Ct. at 1630; "Where ***economic*** activity substantially affects interstate commerce, legislation regulating that activity will be sustained." (emphasis added) *Id.*; "Even *Wickard* [v. *Filburn*, 63 S.Ct. 82 (1942)] . . . involved ***economic*** activity . . . ." (emphasis added) *Id.*; "Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of ***economic*** enterprise . . . ." (emphasis added) 514 U.S. at 559, 115 S.Ct. at 1630-31; Section 922(q) cannot "be sustained under our cases upholding regulation of activities that arise out of or are connected with a ***commercial transaction*** . . . ." (emphasis added) 514 U.S. at 560, 115 S.Ct. at 1631; "The possession of a gun in a local school zone is in no sense an ***economic*** activity . . . ." (emphasis added) 514 U.S. at 563, 115 S.Ct. at 1634. See also *Katzenbach* v. *McClung*, 379 U.S. 294, 85 S.Ct. 377, 383 (1964)(local activity may "'be reached by Congress if it exerts a substantial ***economic*** effect on interstate commerce . . . .'")(emphasis added). Even the dissent in *Lopez* did not dispute that it was only intrastate *economic* activity which could be regulated under the Commerce Clause. 514 U.S. at 577, 115 S.Ct. at 1657-58.[3]

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[3] The dispute between the dissent and the majority in evaluating the effect of the intrastate activity on interstate commerce concerned only the degree to which the courts must defer to Congress. The majority concluded that, in the absence of legislative findings, the courts must determine for themselves whether an activity is economic and then evaluate the effect of the activity on interstate commerce. 514 U.S. at 560, 115 S.Ct. at 1631.

The Court of Appeals' decision that a regulated activity need not be economic also runs directly counter to this Court's *per curiam* decision in *United States* v. *Robertson*, 514 U.S. at 560, 115 S.Ct. 1732 (1995), decided the week after *Lopez*. In *Robertson*, this Court referred to earlier cases as defining "the extent of Congress' power over purely ***intra***state ***commercial*** activities that nonetheless have substantial ***inter***state effects." (bold emphasis added). 514 U.S. at 560, 115 S.Ct. at 1733.

In any event, this Court's decision last week in *Brzonkala v. Morrison*, No. 99-29 (5/15/00) has now removed any doubt on this score, concluding that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is *economic* in nature." (emphasis added). Brzonkala, Slip Op. 13. Indeed, the Court criticized the dissent for "downplay[ing] the role that the economic nature of regulated activity plays in our Commerce Clause analysis." Slip Op. 10. This Court thus invalidated 42 U.S.C. § 13981 as "[g]ender-motivated crimes of violence are not, in any sense of the phrase, *economic* activity." (emphasis added). Slip Op. 13.

The Court of Appeals' decision also misapplied *Lopez*'s analysis of *Wickard* v. *Filburn*, 317 U.S. 111, 63 S.Ct. 82 (1942). The Court of Appeals stated that the "*Lopez* Court's discussion of *Wickard* demonstrates that what makes a regulated activity 'economic' is not that it is intrinsically commercial in any ordinary sense of the word, but that it 'substantially affects' a larger market for the product in interstate commerce." 192 F.3d at 1057. At the page of *Lopez* cited by the Court of Appeals, *Lopez* in fact states of the Act at issue in *Wickard*:

> The Act was designed to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages, and concomitant fluctuation in wheat prices, which had previously obtained.

514 U.S. at 560, 115 S.Ct. at 1630.

Thus, for an activity to be "economic," it must not simply "substantially affect" a larger market for the product in interstate commerce, but must do so in a manner that has economic effects, i.e., affects the volume and thus prices of the product. Indeed, *Wickard* noted that "home-consumed wheat would have a substantial influence on price and market conditions." 317 U.S. at 128, 63 S.Ct. at 90.

The Court of Appeals also relies on *Lopez*'s quotation of the statement in *Wickard* that, "though [an intrastate activity] be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . ." 317 U.S. at 125, 63 S.Ct. at 89 (cited at 514 U.S. at 556, 115 S.Ct. at 1628). This language from *Wickard* was plainly viewed by *Lopez* not as a holding but as *dictum* since *Lopez* subsequently stated:

> Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained. . . . Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved *economic* activity . . . . (emphasis added).

514 U.S. at 560, 115 S.Ct. at 1630.

In *Brzonkala*, this Court did not retreat from this view of *Wickard*. Rather, this Court made the precise point again. *Brzonkala*, Slip Op. 9-10.

In sum, this Court has made clear that intrastate activity must be economic to be regulated under the Commerce Clause. The Court of Appeals has ignored this mandate.

II. THE STANDARD OF REVIEW OF AN ACT OF CONGRESS REGULATING INTRASTATE ACTIVITY UNDER THE COMMERCE CLAUSE ADOPTED BY THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISION IN *LOPEZ* AND *BRZONKALA*

1. In *Brzonkala*, this Court revisited and amplified its holding in *Lopez* concerning the standard of judicial review of the constitutionality of an act of Congress under the Commerce Clause, reiterating, *inter alia*, that the question of whether an act of Congress substantially affects interstate commerce "'is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.' (citation omitted)." *Lopez*, 514 U.S. at 557, 115 S.Ct. at 1629, n.2. *Brzonkala*, Slip Op. 14. Thus, courts are required to make an "independent evaluation of constitutionality under the Commerce Clause . . . ." *Lopez*, 514 U.S. at 561, 115 S.Ct. 1631.

Despite this clear direction from this Court, the Court of

Appeals' decision does not mention anywhere in its opinion its obligation to make an independent evaluation, let alone make such an evaluation of § 922(v)(1). Indeed, the Court of Appeals' affirmatively misstated the holding of *Lopez* when it wrote that this Court "concluded that Congress had no rational basis for finding that gun possession in a school zone had a substantial effect on interstate commerce and declared the statute unconstitutional. See [*Lopez*, 514 U.S.] at 567." 192 F.3d at 1055. A review of the cited page of *Lopez* reveals that this Court did *not* conclude that Congress had "no rational basis" for finding that gun possession in a school zone had a substantial effect on interstate commerce. Rather, because the Court made an "independent evaluation of constitutionality under the Commerce Clause" (*Lopez*, 514 U.S. at 561, 115 S.Ct. 1631), it flatly rejected the Government's argument "that Congress could rationally have concluded that § 922(q) substantially affects interstate commerce." *Lopez*, 514 U.S. at 564, 115 S.Ct. at 1632.

Based upon its failure to apply *Lopez*'s requirement for an independent evaluation of the constitutionality of § 922(v)(1), the Court of Appeals instead conducted a review of the legislative history of § 922(v)(1) to find evidence on which Congress could have relied in believing that intrastate manufacture, transfer, and possession of "semiautomatic assault weapons" had a substantial effect on interstate commerce. 192 F.3d at 1055.

The Court of Appeals' decision is also contrary to *Brzonkala*'s express adoption of the holding of *Lopez* that "'simply because Congress may conclude that a particular activity substantially affects interstate commerce does not

necessarily make it so.'" 514 U.S. at 557, 115 S. Ct. at 1629, n.2 (citation omitted). *Brzonkala*, Slip Op. 14. Indeed, in *Brzonkala*, this Court unequivocally stated: "[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." *Id.* Plainly, therefore, this Court has rejected the rational basis test adopted by the Court of Appeals.

Having adopted a test not sanctioned by *Lopez*, and again rejected by *Brzonkala*, the Court of Appeals applied its test first to the intrastate manufacture and transfer of "semiautomatic assault weapons" and then to the intrastate possession of "semiautomatic assault weapons."

2. With respect to the manufacture and transfer of "semiautomatic assault weapons," the Court of Appeals observed that "the manufacture of goods which may ultimately never leave the state *can* still be activity which substantially affects interstate commerce. *See United States v. Darby*, 312 U.S. 100, 118-19, 61 S.Ct. 451, 85 L.Ed. 609 (1941); *NLRB v. Jones & Laughlin*, 301 U.S. 1, 37, 57 S.Ct. 615, 81 L.Ed. 893 (1937) . . . ." (emphasis added). 192 F.3d at 1057. Moreover, "the transfer of goods, even as part of an intrastate transaction, *can* be an activity which substantially affects interstate commerce." (emphasis added). 192 F.3d at 1058.

Notwithstanding the acknowledged conditional nature of its conclusions concerning intrastate manufacture and transfer, and without pointing to a scintilla of evidence which would provide a factual basis concerning a national market for "semiautomatic assault weapons," the Court of Appeals nonetheless baldly concluded that "it is not even arguable that

the manufacture and transfer of 'semiautomatic assault weapons' for a national market cannot be regulated as activity substantially affecting interstate commerce." 192 F.3d at 1058. Thus, even under the Court of Appeals' understanding of this Court's jurisprudence, the Court of Appeals reached a conclusion unsupported by facts in evidence, either in the legislative history or in the record in this case.

In addition to assuming facts not in evidence, i.e., that the manufacture and transfer of "semiautomatic assault weapons" was "for a national market," the Court of Appeals relied on *NLRB v. Jones & Laughlin*, *supra*, with respect to the power of Congress to regulate *intra*state manufacturing. *NLRB* did not hold, however, that all *intra*state manufacturing, merely by virtue of being manufacturing, may be regulated as activity substantially affecting interstate commerce. Rather, at the page of *NLRB* cited by the Court of Appeals, this Court held:

> Although activities may be intrastate in character when separately considered, *if* they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. (emphasis added).

301 U.S. at 37, 57 S.Ct. at 624.[4]

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[4] The activities of the Jones & Laughlin Steel Corporation demonstrating their substantial relation to interstate commerce are set forth at 301 U.S. at 25-28, 57 S.Ct. at 619-20.

Thus, to be subject to congressional regulation under the Commerce Clause, *intra*state manufacturing must have "a close and substantial relation to interstate commerce . . . ."

Consistent with this view of the commerce power, this Court in *Lopez* observed: "[W]e have upheld a wide variety of congressional acts regulating intrastate economic activity *where we have concluded* that the activity substantially affected interstate commerce." (emphasis added). 514 U.S. at 559, 115 S.Ct. at 1630. Thus, as the Court of Appeals cites nothing upon which to base an independent evaluation of whether the manufacture and transfer of "semiautomatic assault weapons" have "such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions," the Court of Appeals' conclusion is directly contrary to the holding of *NLRB* as reiterated in *Lopez*.

The Court of Appeals is equally in error with respect to its view of *Wickard* as permitting the regulation of all *intra*state transfers of products. In *Wickard*, as described in *Lopez*:

> The Act was designed to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages, and concomitant fluctuation in wheat prices, which had previously obtained. (emphasis added).

514 U.S. at 560, 115 S.Ct. at 1630.

Thus, intrastate transfers of products are subject to

regulation if they substantially affect the volume of the product moving in interstate commerce to avoid price fluctuation. The Court of Appeals cites nothing upon which to base an independent evaluation of whether the transfer of "semiautomatic assault weapons" has such an effect.

3. As to the regulation of *intra*state possession of "semiautomatic assault weapons," the Court of Appeals asserts only that "there is extensive legislative history indicating a firm congressional intent to control the flow through interstate commerce of semiautomatic assault weapons bought or manufactured in one state and subsequently transported into other states." 192 F.3d at 1058. But a "firm congressional intent" to regulate *inter*state commerce is not evidence that *intra*state *possession* of "semiautomatic assault weapons" substantially affects interstate commerce.[5] Indeed, a "firm congressional intent" does not even rise to the level of congressional findings, which themselves are "not sufficient . . . to sustain the constitutionality of Commerce Clause legislation." *Brzonkala*, Slip Op. 14.

The Court of Appeals goes on to conclude that "the intrastate activities regulated by the Act nonetheless have a substantial effect on interstate commerce." 192 F.3d at 1061. As support for this conclusion, the Court of Appeals relies on "congressional hearings" (192 F.3d at 1058) and "congressional findings accompanying federal firearms legislation enacted prior to the Act at issue." 192 F.3d at 1062.

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[5] Moreover, as discussed, *supra*, possession of a "semiautomatic assault weapon" is not "intrastate *economic* activity . . . ." (emphasis added) *Lopez*, 514 U.S. at 559, 115 S.Ct. at 1630.

With respect to the congressional hearings, the Court of Appeals acknowledged that the hearings concerned only "the flow through interstate commerce of semiautomatic assault weapons . . . ." 192 F.3d at 1058. Indeed, the Court of Appeals noted that the reports on the hearings "do not specifically address the Commerce Clause" and thus do not "pinpoint the effect of the regulated activities on interstate commerce . . . ." 192 F.3d at 1058.[6] This is in stark contrast to the congressional hearings in the two cases relied on by the Court of Appeals for the proposition that congressional hearings may be a basis for upholding

> legislation under the Commerce Clause solely on the basis of congressional hearings. *See Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 252-53 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294, 299-300 (1964).

192 F.3d at 1062.

In *Heart of Atlanta Motel, Inc.*, "the record of passage [of the Act] through each house is replete with evidence of the *burdens* that discrimination by race or color places *upon interstate commerce*." (emphasis added). 379 U.S. at 252.

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[6] The House committee report made no reference to interstate commerce, stating only that § 922(v)(1) was designed to:

> create criminal penalties for the manufacture, transfer, or possession of certain firearms within the category of firearms known as "semiautomatic assault weapons."

House Report No. 103-489, 103rd Cong., 2d Sess. (1994), *reprinted*, 1994 U.S.C.C.A.N. at 1820.

Moreover, this Court referred to testimony that "indicated a qualitative as well as quantitative *effect on interstate travel* by Negroes." (emphasis added). 379 U.S. at 253. Further, there was "overwhelming evidence that discrimination by hotels and motels *impedes interstate travel*." (emphasis added). *Id.* Similarly, in *Katzenbach*, this Court noted: "The record is replete with testimony of the *burdens* placed *on interstate commerce* by racial discrimination in restaurants." (emphasis added). 379 U.S. at 299. Moreover, "there was an impressive array of testimony that discrimination in restaurants had a *direct and highly restrictive effect upon interstate travel* by Negroes." (emphasis added). 379 U.S. at 300. Finally, this Court concluded that "the evidence presented at the hearings fully indicated the nature and effect of the *burdens on commerce* which Congress meant to alleviate." (emphasis added). 379 U.S. at 304.

With respect to "congressional findings accompanying federal firearms legislation enacted prior to the Act at issue" (192 F.3d at 1062), the Court of Appeals relies on *precisely* the same findings which *Lopez* held were "especially inappropriate" because they did not "'speak to the subject matter of section 922(q) or its relationship to interstate commerce.'" (emphasis added) *Lopez*, 514 U.S. at 563, 115 S.Ct. at 1632 (quoting *United States* v. *Lopez*, 2 F.3d 1342, 1366 (5th Cir. 1993)).[7]

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[7] In any event, the findings at issue, i.e., the findings accompanying Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. 90-351, 82 Stat. 197 (1968) ("OCCSSA"), were repealed.

Section 907 of the OCCSSA provided that "[t]he amendments made by [Title IV] shall become effective one hundred and eighty days after the date of its enactment . . . ." The Act was enacted on June 19,

The Court of Appeals rejects the reasoning of *Lopez* as applied to § 922(v)(1) on the ground that "the subject matter of both the prior firearms legislation and the present Act is control over the distribution of firearms in a national market." 192 F.3d at 1064.

What is first evident from the Court of Appeals' statement is that it has ignored the second part of *Lopez*'s standard for determining if previous congressional findings can be applied to a subsequently enacted statute: whether the findings "speak to the [regulated activity's] relationship to interstate commerce." Thus, on this basis alone, the Court of Appeals is in conflict with *Lopez* in applying previous

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1968, making its effective date December 16, 1968. On October 22, 1968, however, the Gun Control Act of 1968 was enacted. Pub. L. 90-618, 82 Stat. 1213 (1968). Title I of that Act became effective on December 16, 1968. § 105. According to the Senate Judiciary Committee Report on the Act, Section 105 "provides that the effective date of this title shall be the date that title IV of the Omnibus Crime Control and Safe Streets Act of 1968 becomes effective, as provided by section 907 of that act." Senate Report No. 1501, 90th Cong., 2d Sess. (1968).

The Court of Appeals asserted that the findings were not repealed since "implied repeals by implication should be avoided." 192 F.3d at 1063, n. 8. While this rule of statutory construction is correctly stated, as stated, it is applied in the context of statutes existing side by side. In the case of acts such at those at issue here, where the latter act is a *substitute* for the prior act, this Court has held that, under

> well-settled categories of repeals by implication: . . . if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act.

Posadas v. *National City Bank of New York*, 296 U.S. 497, 503, 56 S.Ct. 349, 352 (1936).

congressional findings to § 922(v)(1) since the findings do not speak to the relationship of the manufacture, transfer, and possession of "semiautomatic assault weapons" to interstate commerce.

Moreover, the subject matter of § 922(v)(1) is neither control over firearms generally nor their distribution in a national market. Rather, the subject matter of § 922(v)(1) is "semiautomatic assault weapons" and their *intrastate* manufacture, transfer, and possession. The Court of Appeals points to nothing (as nothing exists) in the previous congressional findings mentioning "semiautomatic assault weapons" or their intrastate manufacture, transfer, and possession.

In defense of its failure to follow *Lopez*'s view of the inapplicability of previous congressional findings, the Court of Appeals asserts that *Lopez* "does not speak with sharpness or clarity in laying down a test for determining if a statute represents a break with a long-standing pattern of prior legislation." 192 F.3d at 1063. The Court of Appeals turns to *Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017 (1968) as being "more instructive on this issue." 192 F.3d at 1063-4. *Maryland v. Wirtz*, however, demonstrates that the previous congressional findings relied on by the Court of Appeals do not apply to § 922(v)(1).

In *Maryland v. Wirtz*, the previous findings relied on by this Court were directly related to whether there was a substantial effect on interstate commerce:

Congress had found that substandard wages and

> excessive hours, when imposed on employees of a company shipping goods into other States, gave the exporting company an advantage over companies in the importing States.

392 U.S. at 189, 88 S.Ct. at 2020.

This Court also noted that:

> Congress stated its finding that substandard labor conditions tended to lead to labor disputes and strikes, and that when such strife disrupted businesses involved in interstate commerce, the flow of goods in commerce was itself affected.

392 U.S. at 191, 88 S.Ct. at 2021.

The lesson of *Wirtz*, as reiterated by *Lopez*, is manifest. For previous congressional findings to be relied upon, they must speak both to the specific subject matter of the regulated activity and its affect on interstate commerce. The findings relied on to support § 922(v)(1) fit neither criterion.

In sum, the Court of Appeals had no basis for concluding, under this Court's jurisprudence, that the *intra*state manufacture, transfer, or possession of "semiautomatic assault weapons" had a substantial effect on interstate commerce.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 10, 1999
Decided October 8, 1999

No. 98-5491

NAVEGAR, INCORPORATED, *D/B/A* INTRATEC, AND
PENN ARMS, INCORPORATED,
APPELLANTS

v.

UNITED STATES OF AMERICA,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 95cv00550)

Richard E. Gardiner argued the cause and was on the briefs for appellants.

Mark B. Stern, Attorney, United States Department of Justice, argued the cause for appellee. With him on the brief were *David W. Ogden*, Acting Assistant Attorney General, *Michael S. Raab*, Attorney, and *Wilma A. Lewis*, United States Attorney.

Before: WALD, SILBERMAN and TATEL, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* Wald.

WALD, *Circuit Judge*: Navegar, Inc., doing business as Intratec ("Intratec"), and Penn Arms, Inc. ("Penn Arms") (together "appellants"), are licensed by the United States Bureau of Alcohol, Tobacco and Firearms ("BATF") to manufacture firearms. Intratec and Penn Arms brought a declaratory judgment action under 28 U.S.C. s 2201 in the United States District Court for the District of Columbia to challenge the constitutionality of section 110102 of the Violent Crime Control and Law Enforcement Act of 1994. *See* Pub. L. No. 103-322, 108 Stat. 1796, 1996-98 (codified at 18 U.S.C. ss 921(a)(30), 922(v) (1994)). Section 110102(a) makes it unlawful to "manufacture, transfer or possess a semiautomatic assault weapon." *See* 108 Stat. at 1996-97 (codified at 18 U.S.C. s 922(v)(1)). Section 110102(b) specifically identifies the precise weapons Intratec and Penn Arms manufacture as semiautomatic assault weapons. *See* 108 Stat. at 1997-98 (codified at 18 U.S.C. § 921(a)(30)(A)(viii), (ix)). Appellants sought a declaration that these provisions exceed Congress' Commerce Clause power, and are unconstitutional Bills of Attainder.

Both the appellants and the government filed cross-motions for summary judgment on both of the constitutional challenges to the Act. *See* Memorandum Order and Opinion, Joint Appendix ("J.A.") at 43. The district court issued a Memorandum Order and Opinion granting the government's motion, rejecting appellants' motion and dismissing the case. We affirm the district court's grant of summary judgment on both of appellants' challenges.

I. Background

A. *The Violent Crime Control and Law Enforcement Act of 1994*

In 1994, Congress passed the Violent Crime Control and Law Enforcement Act. Pub. L. No. 103-322, 108 Stat. 1796 ("the Act"). Subtitle A of Title XI of the Act, which regulates assault weapons, is entitled the "Public Safety and Recreational Firearms Use Act." *See* Violent Crime Control and Law Enforcement Act of 1994, § 110101, 108 Stat. 1796, 1996. Section 110102(a) of the Act makes it "unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon." *See* 18 U.S.C. s 922(v)(1). Section 110102(b) defines "semiautomatic assault weapon" to include "any of the firearms, or copies or duplicates of the firearms" enumerated in nine categories of guns identifying 15 weapons by name. *See* 18 U.S.C. s 921(a)(30)(A). Two of the categories of guns specified by the statute are "INTRATEC TEC-9, TEC-DC9, and TEC-22; and ... revolving cylinder shotguns, such as (or similar to) the Street Sweeper and Striker 12." 18 U.S.C. ss 921(a)(30)(A)(viii), (ix). The definition of "semiautomatic assault weapon" in section 110102(b) also includes semiautomatic rifles and semiautomatic pistols that have the ability to accept a detachable magazine and any two of five enumerated accessories, and semiautomatic shotguns that have any two of four enumerated features. *See* 18 U.S.C. ss 921(a)(30)(B)-(D).

Section 110102(a) of the Act contains a "grandfather" clause which exempts from the Act semiautomatic assault weapons lawfully possessed on the date of enactment. *See* 18 U.S.C. s 922(v)(2). The Act does not apply to certain

enumerated firearms as well as firearms, replicas or duplicates of firearms specified in an appendix. *See id.* s 922(v)(3); *id.* App. A. Persons convicted of knowingly violating the Act are subject to a fine and imprisonment of up to five years. *See id.* s 924(a)(1).

B. Factual Background

Appellants are the sole manufacturers of firearms identified by name in the Act as "semiautomatic assault weapons." *See* 42 U.S.C. s 921(a)(30)(A)(viii), (ix). Intratec is the sole manufacturer of the TEC-DC9[2] and TEC-22 semiautomatic pistols. Penn Arms is the sole manufacturer of the Striker 12, 12S, 12E and 12SE, 12-gauge revolving cylinder shotguns. *See Navegar, Inc.* v. *United States*, 914 F. Supp. 632, 633 (D.D.C. 1996). On September 13, 1994, the Act became law and agents from the BATF visited appellants' facilities to inform appellants' officers of the prohibitions of the Act and give notice that they planned to conduct inventories of the weapons that would be grandfathered. *See Navegar, Inc.* v. *United States*, 103 F.3d 994, 997 (D.C. Cir. 1997). Over the next two days, the BATF conducted these inventories. *See id.*

On September 26, 1994, the BATF sent letters to all federally licensed firearm manufacturers, including Intratec and Penn Arms, giving notice of the "grandfather" provision, and that the BATF would permit seven additional days of weapon manufacturing before it would take a final inventory identifying all grandfathered weapons. *See Navegar*, 914 F. Supp. at 633.

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[2] The Intratec TEC-DC9 is simply the the Intratec TEC-9 renamed. *See Navegar, Inc. v. United States*, 914 F. Supp. 632, 633 (D.D.C. 1996).

When the additional seven-day window for grandfathering weapons closed, Intratec held in its inventory over 40,000 TEC-DC9 and TEC-22 frames and thousands of dollars of gun parts which it could no longer assemble. Penn Arms was unable to take advantage of the seven-day window and was left with an inventory of $58,000 worth of gun parts for the Striker 12 series of shotguns. *See id.* at 634-35.

C. Procedural Background

In March, 1995, Intratec and Penn Arms filed a declaratory judgment action in the United States District Court for the District of Columbia, challenging the constitutionality of certain provisions of the Act. *See* First Amended Compl., J.A. at 9. Appellants alleged that neither s 922(v)(1) nor s 922(w)(1), which prohibits the transfer or possession of a large capacity feeding device, fell within the powers delegated to Congress under Article I because there were no legislative findings nor anything in the language of the Act which indicated any nexus with Congress' delegated powers. *See id.*, J.A. at 15. In addition, appellants asserted that s 922(v)(1) together with s 922(a)(30)(A)(viii), (ix), singled out the TEC-DC9, TEC-22 and Striker 12 for prohibition in order to punish them for manufacturing their products and thus were unconstitutional Bills of Attainder. *See id.*, J.A. at 15-16, 20-22. Further, they alleged that provisions using general terms to include certain types of semiautomatic rifles, pistols and shotguns, 18 U.S.C. s 921(a)(30)(B)-(D), in the definition of "semiautomatic assault weapon" were void for vagueness under the Due Process clause of the Fifth Amendment. *See id.*, J.A. at 17-20.

The government filed a motion for summary judgment on the ground that appellants did not have standing to bring a

pre-enforcement challenge to the provisions of the Act since they did not demonstrate a genuine threat of prosecution. On February 1, 1996, the district court issued a Memorandum Order and Opinion granting the government's motion and dismissing appellants' case. *See Navegar*, 914 F. Supp. at 632. Appellants appealed the district court's decision on standing to this court. *See Navegar, Inc.* v. *United States*, 103 F.3d 994 (D.C. Cir. 1997). This court held that since the provisions prohibiting the weapons that Intratec and Penn Arms alone manufactured effectively single them out as intended targets, these provisions presented an imminent threat of prosecution sufficient to bring a pre-enforcement challenge. *See id. at 1001.* However, this court also held that appellants had failed to show an imminent threat of prosecution under 18 U.S.C. ss 921(a)(30)(B)-(D) and 922(w), which outlawed items using general terms, because nothing indicated a special priority of enforcement against appellants and the general nature of the language made it impossible to predict whether these provisions would be applied to them. *See id.* at 1002. Therefore, this Court reversed the part of the order of the district court relating to the enumerated powers claims challenge to s 922(v)(1) and the Bill of Attainder challenge to 18 U.S.C. ss 921(a)(30)(A)(viii), (ix) in conjunction with s 922(v)(1) and affirmed the decision to dismiss the void for vagueness claims and the enumerated powers challenge to s 922(w)(1). *See id.*

On remand to the district court, appellants sought leave to amend their complaint to demonstrate that their challenges to the general provisions of the Act were justiciable in light of this court's prior decision. *See* Memorandum Order and Opinion, J.A. at 43. On December 1, 1997, the district court issued an opinion denying appellants' motion to amend their complaint. *See Navegar, Inc.* v. *United States*, 986 F. Supp. 650 (1997).

The district court held that the motion to amend was futile because the proposed amended complaint failed to establish standing to bring a pre-enforcement challenge to the provisions of the Act prohibiting general categories of weapons. *See id.* at 653. Appellants did not appeal that order.

The appellants and the government subsequently filed cross-motions for summary judgment on the enumerated powers challenge to § 922(v)(1) and the Bill of Attainder challenge to § 922(v)(1) in conjunction with s 921(a)(30)(A)(viii), (ix). The district court held that Congress did not exceed its authority in enacting § 922(v)(1) of the Act and that § 922(v)(1) together with § 921(a)(30)(viii), (ix) does not constitute a Bill of Attainder with respect to Intratec and Penn Arms. *See* Memorandum Order and Opinion, J.A. at 89. On the basis of congressional testimony discussing the Act, the legislative history of prior Acts regulating firearms and the decisions of other courts of appeals upholding the validity of the Firearms Owner Protection Act of 1986, which prohibits the "transfer or possession of machine guns," the district court held that the Act regulated activities that had a substantial effect on interstate commerce. *See id.*, J.A. at 76. The district court further held that the Act did not constitute a Bill of Attainder because even though provisions of the Act singled out guns made by Intratec and Penn Arms, the ban on the manufacture, transfer and possession did not fall within a historical meaning of punishment, promoted non-punitive legislative purposes, and did not manifest a congressional intent to punish. *See id.*, J.A. at 88. Therefore, the district court granted the government's motion for summary judgment, denied appellants' motion and dismissed appellants' claims. This appeal followed.

II. Discussion

A. The Constitutional Attack Under the Commerce Clause

1. The Scope of Congress' Commerce Clause Power After Lopez

In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court refined the scope of Congress' powers under the Commerce Clause. Lopez held that the Gun Free School Zones Act of 1990, which made possession of a firearm within 1,000 feet of a school a federal offense, exceeded Congress' Commerce Clause authority. *See id.* at 561. The *Lopez* Court identified three broad categories of activity that Congress may regulate under its Commerce Clause authority: (1) The "use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "those activities having a substantial relation to interstate commerce ... i.e., those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59.

The Court quickly concluded that possession of a gun in a school zone did not fit the first two categories. *See id.* at 559. The Court subsequently concluded that such activity could not be regulated under the third category either; it did not substantially affect interstate commerce because it was not related to any sort of economic enterprise, nor was its regulation an essential part of a larger regulation of interstate economic activity, so that the interstate regulatory scheme would be undercut unless the intrastate activity were regulated. *See id.* at 560. Further, the Court explained that Congress had

made no findings about the effect of such activity on interstate commerce nor did the Act contain a jurisdictional element which would ensure that, as applied, the firearm possession in question would always affect interstate commerce. *See id.* 561-62. In addition, the Court rejected arguments made at trial about the economic costs of gun possession in school or that effective education is essential to national productivity; it said such attenuated reasoning, which would require it to pile inference upon inference to find a connection to commerce, would justify a limitless amount of regulation of intrastate activity by Congress. *See id.* at 564, 567. Therefore, the Court concluded that Congress had no rational basis for finding that gun possession in a school zone had a substantial effect on interstate commerce and declared the statute unconstitutional. *See id.* at 567.

In this case, we do not find it necessary to analyze whether the Act is a *Lopez* category 1 regulation of the channels of interstate commerce or a category 2 regulation of the instrumentalities of or persons or things in interstate commerce because the Act readily falls within category 3 as a regulation of activities having a substantial affect on interstate commerce.[3]

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[3] Appellees argued below that the provisions at issue may also be classified as a category 1 regulation of the channels of interstate commerce. The trial judge concluded that it could not. We need not address this issue. Some of our prior cases indicate that some statutes are capable of classification as both a category 1 and category 3 regulation of commerce. *See National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1046 (D.C. Cir. 1997). A prime example of the interconnection of categories 1 and 3 is the *Lopez* Court's citation of *United States v. Darby*, 312 U.S. 100, 114 (1941), as a category 1 case and *Maryland v. Wirtz*, 392 U.S. 183, 196, n.27 (1968), for category 3. *See* 514 U.S. at 558-59. *Wirtz* involved a challenge to a 1961 amendment to the Fair Labor Standards Act originally

The legislative history and congressional hearings conducted prior to the Act clearly manifest a congressional intent to restrict the interstate flow of "semiautomatic assault weapons," especially across the borders of states which had laws prohibiting such weapons. Furthermore, the constitutionality of the Act is supported by the history of prior firearms legislation such as the Omnibus Crime Control and Safe Streets Act of 1968 and the Gun Control Act of 1968, which contain congressional findings that there is a large interstate market in firearms and firearms legislation is aimed at controlling that market. Finally, eight other circuit courts of appeals have upheld a similar prohibition of the "transfer or possession of machine guns" against post-*Lopez* commerce clause challenges.[4]

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challenged in *Darby*. The amendment extended the coverage of the FLSA from employees "engaged in commerce" to employees "employed in an enterprise engaged in commerce or in the production of goods for commerce." *See* 392 U.S. at 188. The Supreme Court held that the constitutionality of the 1961 extension of employees covered by the Act was "settled by the reasoning of *Darby* itself." *Id.* Therefore *Wirtz*, the paradigmatic category 3 case according to *Lopez*, is in fact a category 1 case as well. The confluence of categories 1 and 3 demonstrates that while the categories are useful as a synopsis of the Supreme Court's Commerce Clause jurisprudence, the attempt to fit a regulation squarely within one category can prove elusive, even fruitless.

[4] 3 The confluence of *Lopez* categories 1 and 3 is also apparent from the cases where other circuits have upheld the Firearm Owners Protection Act of 1986, ("FOPA"), which makes it unlawful to "transfer or possess a machine gun." 18 U.S.C. s 922(o) (1994). FOPA has been upheld as a *Lopez* category 3 regulation of an activity with a substantial effect on interstate commerce by the Second, Third, Fifth, Seventh, Tenth and Eleventh Circuits. *See United States v. Franklyn*, 150 F.3d 90, 96 & n.3 (2d Cir. 1998) (not deciding whether FOPA fell within *Lopez* category 1); *United States v. Wright*, 117 F.3d 1265, 1270 (11th Cir. 1997), *vacated*

2. *Activities Which May Be Regulated Because they Have a Significant Effect on Interstate Commerce*

Appellants argue that after *Lopez*, Congress only has power to regulate "economic" or "commercial" activities and since Congress passed this statute principally to regulate the criminal activity--not commercial activity--associated with possession of a semiautomatic assault weapon, the Act is not a proper exercise of the Commerce power. This court has already held that a "regulated activity ... need not be commercial, so long as its effect on interstate commerce is substantial." *Terry* v. *Reno*, 101 F.3d 1412, 1417 (D.C. Cir. 1996). Alas, appellants contend that this Court's conclusion in Terry is incorrect and "finds no support in *Lopez*." *See* Appellants' Br. at 10. Appellants badly misread both *Terry* and *Lopez*.

A close examination of *Lopez* reveals that it supports the reasoning of *Terry*. *Lopez* described a statute prohibiting possession of a gun within 1000 feet of a school which it struck

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on other grounds, 133 F.3d 1412 (1998); *United States v. Knutson*, 113 F.3d 27, 30 (5th Cir. 1997) (avoiding the issue of category 1 to prevent controversy); *United States v. Rybar*, 103 F.3d 273, 283 (3d Cir. 1996); *United States v. Kenney*, 91 F.3d 884, 890 (7th Cir. 1996); *United States v. Wilks*, 58 F.3d 1518, 1521 (10th Cir. 1995). The FOPA has been upheld as a *Lopez* category 1 regulation of the channels of interstate commerce by the Sixth and Ninth Circuits. *See United States v. Beuckelaere*, 91 F.3d 781, 783 (6th Cir. 1996); *United States v. Rambo*, 74 F.3d 948, 952 (9th Cir. 1995); *see* also *United States v. Kirk*, 70 F.3d 791, 796-97 (5th Cir. 1996), *vacated*, 78 F.3d 160 (1996). Likewise, the First Circuit has upheld under *Lopez* category 3 section 110201 of the Violent Crime Control and Law Enforcement Act, entitled the Youth Handgun Safety Act, which prohibits the mere possession of a firearm by a juvenile. *See United States v. Cardoza*, 129 F.3d 6, 12 (1st Cir. 1997); 108 Stat. 1796, 2010 (codified at 18 U.S.C. § 922(x) (1994)).

down as involving in "no sense an economic activity that might ... substantially affect any sort of interstate commerce." *United States* v. *Lopez*, 514 U.S. 549, 567 (1995) (emphasis added). However, the *Lopez* Court pointedly left out both "economic" and "commercial" when it concluded in a normative vein that "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." 514 U.S. at 559. Furthermore, when the *Lopez* Court did use the term "economic activity," it cited as an example the home consumption of wheat at issue in *Wickard* v. *Filburn*. *See Lopez*, 514 U.S. at 560-61 (citing 317 U.S. 111, 127 (1942).

The *Lopez* Court noted that *Wickard* "involved *economic activity* in a way that the possession of a gun in a school zone does not." *Id.* at 560. *Wickard* involved a constitutional challenge to the Agricultural Adjustment Act of 1938 by farmer Roscoe Filburn. The *Lopez* Court specifically cited as an example of "economic activity" farmer Filburn's personal consumption of his home-grown wheat. *See Lopez*, 514 U.S. at 560 (quoting *Wickard*, 317 U.S. at 128). The passage from *Wickard* quoted in *Lopez* makes clear that wheat grown at home, even if it is not marketed, has a substantial effect on interstate commerce because it competes with wheat in commerce by supplying the " 'need of the man who grew it which would otherwise be reflected by purchases in the open market.' " *Id.* at 560 (quoting *Wickard*, 317 U.S. at 128). The *Lopez* Court's discussion of Wickard demonstrates that what makes a regulated activity "economic" is not that it is intrinsically commercial in any ordinary sense of the word, but rather that it "substantially affects" a larger market for the product in interstate commerce. *See id.* The *Lopez* Court made this point clear with the following quotation from Wickard:

> Even if ... activity be local and *though it may not be regarded as commerce*, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'

Lopez, 514 U.S. 549 at 556 (quoting *Wickard*, 317 U.S. at 125)(emphasis added).

Our decision in *Terry* v. *Reno*, 101 F.3d 1412 (D.C. Cir. 1997), is a logical extension of the reasoning in *Lopez*. In *Terry*, this court upheld the Freedom of Access to Clinic Entrances Act ("FACEA") against a Commerce Clause challenge. *See* 101 F.3d at 1418. This court rejected the argument that Congress could not regulate protest in front of abortion clinics because protest against abortion clinics is an intrastate, noncommercial activity. *See id.* at 1417. We concluded that the regulated activity need not be commercial in nature, rather the only relevant inquiry is whether the *effect* on interstate commerce is substantial. *See id.* This court found that Congress had a rational basis to conclude that abortion clinics engage in interstate commerce because, among other things, they treat patients who travel interstate to obtain abortion services and obtain medical equipment and supplies through interstate commerce. *See id.* at 1415-16, 1417. Therefore, even though violent and obstructive protest was not an intrinsically "commercial" or "economic" activity, we upheld the FACEA because such activity had a substantially adverse effect on interstate commerce in reproductive health services. *See id.* at 1417-18.

The most recent Supreme Court Commerce Clause case of Camps *Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564 (1997), also reinforces our holding in *Terry* that activity need not be commercial in character in order to be regulated under the Commerce Clause. *Camps* involved a Commerce Clause challenge to an otherwise generally applicable state property tax exemption for charitable institutions which excluded organizations operated principally for the benefit of nonresidents. *See id.* at 568. The Supreme Court held that the Commerce Clause applies to activity regardless of whether it was pursued with the purpose of earning a profit. *See id.* at 584. The *Camps* Court cited an earlier opinion in which it struck down a California statute prohibiting the transport of indigent persons into the State under the Commerce Clause by holding that transportation is commerce "'whether or not the transportation is commercial in character.'" *Id.* (quoting *Edwards* v. *California*, 314 U.S. 160, 166 n.1). The *Camps* decision makes clear that an activity can be regulated under the Commerce Clause regardless of whether it is intrinsically "economic" or "commercial" but solely on the basis of its substantial effect on interstate commerce. *See National Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041, 1050 (D.C. Cir. 1997) (hereinafter (NAHB).

3. *Whether the Activity Regulated By the Act Has a Substantial Effect on Interstate Commerce*

The Supreme Court has repeatedly held that the manufacture of goods which may ultimately never leave the state can still be activity which substantially affects interstate commerce. *See United States v. Darby*, 312 U.S. 100, 118-19 (1941); *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 37

(1937) (holding that if manufacturing which may be intrastate in character when separately considered has a substantial effect on commerce, Congress may regulate it). Furthermore, Supreme Court precedent makes clear that the transfer of goods, even as part of an intrastate transaction, can be an activity which substantially affects interstate commerce. *See Lopez*, 514 U.S. at 560-61 (citing *Wickard v. Filburn*, 317 U.S. 127-28 (1942)) (noting that farmer's home consumption of wheat substantially affected interstate commerce)); *see* also *Wickard*, 317 U.S. at 114, 127 (noting that the farmer sold some of his wheat, and that even local marketing substantially affects interstate commerce). Therefore, it is not even arguable that the manufacture and transfer of "semiautomatic assault weapons" for a national market cannot be regulated as activity substantially affecting interstate commerce.

However, the Supreme Court's decision in *Lopez* does raise a question of whether mere possession of a "semiautomatic assault weapon" can substantially affect interstate commerce. For that reason, it is necessary to examine the purposes behind the Act to determine if it was aimed at regulating activities which substantially affect interstate commerce.

Appellants contend that as in *Lopez*, Congress in this Act did not even address the issue of whether the manufacture, transfer and possession of semiautomatic assault weapons affects Commerce. To the contrary, there is extensive legislative history indicating a firm congressional intent to control the flow through interstate commerce of semiautomatic assault weapons bought or manufactured in one state and subsequently transported into other states. First, although the legislative reports accompanying the 1994 Act do not specifically address the Commerce Clause, one report does state that the purpose of the Act was to stop the "widespread" and

growing threat posed by "criminal gangs, drug-traffickers and mentally-deranged individuals armed with semiautomatic assault weapons" by "restricting the availability of such weapons in the future." *See* H.R. Rep. No. 103-489, at 12 (1994), *reprinted* in 1994 U.S.C.C.A.N. 1820, 1820. That report chronicles five years of congressional hearings on the escalating use of semiautomatic assault weapons, the difficulties such weapons cause state police officers and the disproportionate link between such weapons and drug-trafficking and violent crime. *See* H.R. Rep. No. 103-489, at 13-18. While the report itself does not pinpoint the effect of the regulated activities on interstate commerce, the five years of hearings discussed in the legislative report do contain extensive testimony detailing the kind and extent of interstate commerce, featuring the flow of semiautomatic assault weapons across state lines. *See id.* at 13.

The congressional hearings referred to in House Report 489 of the 1994 Act amply demonstrate that the ban on possession in the Act was a measure conceived to control and restrict the interstate commerce in "semiautomatic assault weapons," especially their importation into states which prohibit them. To restrict that commerce it imposed criminal liability for those activities which fuel the supply and demand for such weapons. The ban on possession is a measure intended to reduce the demand for "semiautomatic assault weapons." *See United States v. Rybar*, 103 F.3d 273, 283 (3d Cir. 1996) (holding that FOPA targets the mere intrastate possession of machine guns as a "demand-side measure to lessen the stimulus that prospective acquisition would have on the commerce in machine guns"); *United States v. Rambo*, 74 F.3d 948, 951 (9th Cir. 1995) (holding that the ban on possession is in effect " 'an attempt to control the interstate market ... by creating criminal liability' " for the " 'demand-side of the market, i.e., those who

would facilitate illegal transfer out of the desire to acquire mere possession") (quoting *United States v. Kirk*, 70 F.3d 791, 796 (5th Cir. 1995), vacated, 78 F.3d 160 (1996)). The restriction on the manufacture and transfer of such weapons is an attempt to restrict the supply of such weapons in interstate commerce. Manufacture, transfer and possession are activities that not only substantially affect interstate commerce in "semiautomatic assault weapons," but are also the necessary predicates to such commerce. *See NAHB*, 130 F.3d at 1047. The ban on possession of "semiautomatic assault weapons" in this context is necessary to allow law enforcement to effectively regulate the manufacture and transfers where the product comes to rest, in the possession of the receiver. *See id.*; *Kirk*, 70 F.3d at 796; *see also* 1 Lawrence H. Tribe, *American Constitutional Law* § *5-4 at 819-20 n.50 (3d ed. 2000) (suggesting that the Act in* Lopez might have been upheld as a necessary and proper means of effectuating the commerce power if Congress criminalized only the possession of guns whose interstate sale or transport had been outlawed on the theory that making possession a crime would facilitate enforcement of the ban on sale or transport). The congressional testimony unmistakably shows that the purpose of the ban on possession has an "evident commercial nexus." *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

For instance, Barbara Fass, the Mayor of Stockton, California, testified about the 1989 murders at a schoolyard in her city and complained that "legislation alone in our community is not sufficient." *Semiautomatic Assault Weapons Act of 1989: Hearings on H.R. 1190 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong. 142 (1989) (noting that the assault weapon used was prohibited in Stockton, but the assailant subverted local laws by legally purchasing an assault weapon in Oregon and purchasing the

bullets in Rhode Island). Similarly, Boston Mayor Raymond L. Flynn testified that local controls on assault weapons were ineffective since "people can still buy guns in one state and bring them into another." *Assault Weapons: Hearings on S.386 and S.747 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 101st Cong. 130 (1989); *see also id.* at 87, 143 (remarks of Sen. Simon and statement of Sen. Kennedy) (same). Richard Cook, the Chief of the Firearms Division of the BATF attested to the existence of interstate trafficking in weapons and its connection to interstate drug trafficking. *See Select Crime Issues: Prevention and Punishment: Hearings Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong. 43 (1991) (also noting that "New York City alone seizes some 17,000 illegal weapons each year with 96 percent coming from outside the State" as an example of the large interstate market for firearms).[5]

Congress also heard extensive testimony from police officers about the significant flow of weapons across state lines and the inability of a state to control it. The Vice President of the International Association of Chiefs of Police and Chief of Police of Greensboro North Carolina, Sylvester Daughtry, Jr., testified that "the reason there is no decrease in gun-related

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[5] Congress heard other testimony regarding specific crimes where the assailant subverted state laws by buying a semiautomatic assault weapon in one state and using it to commit a crime in another where it was prohibited. *See id.* at 246 (statement of Catherine Varner); *Assault Weapons: A View From the Front Lines: Hearing Before Senate Committee on the Judiciary*, 103d Cong. 38 (1994) (Statement of Sarah Brady, chair of Handgun Control Int'l).

mayhem as a result of stringent State and local gun control laws is that guns are easily purchased in less stringent locations and brought into these stricter areas.... Gun control will only work if all states are required to observe it." *Public Safety and Recreational Firearms Use Protection Act: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103d Cong. 165 (1994). Fred Thomas, Chief of Police in Washington, D.C. testified that despite stringent gun control laws in the District of Columbia, gun violence did not decrease because "guns are easily purchased in less stringent locations and brought into" D.C. *Assault Weapons: A View From the Front Lines: Hearing Before Senate Committee on the Judiciary*, 103d Cong. 49 (1994) (also noting that of all the firearms seized by D.C. police in the previous year, 97.7 percent came from outside of D.C.). The National President of the International Brotherhood of Police Officers concluded that a national ban on assault weapons was necessary because not only do "many individuals ... travel from one state into another to circumvent state laws" which restrict the sale and use of such weapons, but "such circumvention of laws is common." *See id.* at 58 (statement of Kenneth T. Lyons).[6]

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[6] Congress also heard testimony from state and federal lawmakers regarding the necessity of a national ban on semiautomatic assault weapons because existing state and federal regulation were insufficient. Jim Florio, at that time Governor of New Jersey, testified that "no individual state law, no matter how strong, can stop the deadly flow of these weapons across State lines." *Assault Weapons: A View From the Front Lines: Hearing Before Senate Committee on the Judiciary*, 103d Cong. 22 (1994) (also noting that the day a New Jersey statewide ban on assault weapons took effect, a man with an assault weapon obtained from Florida took a mother and her two children hostage, murdered the mother and shot her daughter 14 times). Then-Representative Charles Schumer testified before the

In sum, the congressional testimony on the bill shows that Congress was well aware that there was significant interstate traffic in semiautomatic assault weapons and that state laws and existing federal firearms regulation were inadequate to control the flow of these weapons across state lines.

Appellants asserted at oral argument, however, that the real purpose of the Act must be to prohibit purely intrastate manufacture, transfer and possession of semiautomatic assault weapons because both the manufacture and transfer of semiautomatic assault weapons designed for interstate commerce is already prohibited by statute. However, we can locate no federal law other than the Act which specifically restricts intra- or interstate manufacture, transport or possession of semiautomatic assault weapons. *See, e.g.*, 18 U.S.C. s 922. Before this Act was passed, manufacturing, importing, and dealing in "semiautomatic assault weapons" was legal for any licensed importer, licensed manufacturer or licensed dealer of firearms (hereinafter "licensee"). *See* 18 U.S.C. s 922(a)(1). The prior statutory framework of firearms legislation thus left unregulated a wide array of manufacture, transfer and possession of firearms all with undeniable substantial effects on interstate commerce.[7] The interstate

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Senate Judiciary Committee that "[o]ne city or state simply can't control the flow of weapons. They just go buy them in another state. We need a national ban." *Id.* at 7; *see also id.* at 11 (statement of Senator Diane Feinstein) (stating that "without a national ban on these weapons ... state and local initiatives are meaningless. Lenient laws allow gun buyers ... to simply cross state lines and purchase their weapons of choice.").

[7] While s 922(b)(3) prohibits a licensee from selling or delivering a firearm to an unlicensed transferee whom the licensee knows or has reasonable cause to know does not reside in the state of the licensee's place

of business ("LPOB"), it allows a licensee to (a) sell or deliver any rifle or shotgun to a resident of a state other than the state of the LPOB if the transferring parties meet in person to effectuate the transfer, and the sale, delivery and receipt comply with legal conditions of sale in both the state of residence of the transferee and place of business of the transferor and (b) to loan or rent a firearm to any person for temporary use for lawful sporting purposes.

Further, s 922(a)(3) allows any licensee to transport or deliver any firearm obtained outside her state into her state. *See id.* s 922(a)(3). Persons without a license cannot transport weapons in that fashion except for lawful receipt out-of-state through intestate succession or bequest or the transportation or receipt of any rifle or shotgun sold or delivered to her under s 922(b)(3). *See id.* s 922(a)(3)(A), (B). In addition, any unlicensed person is prohibited from transferring any firearm to any person whom the transferor knows or has reason to believe does not reside in her state except for (a) the transport, transfer or delivery of a firearm pursuant to a bequest or intestate succession and (b) the loan or rental of a firearm to another for temporary use for lawful sporting purposes. *See id.* s 922(a)(5). Finally, any person not otherwise prohibited from transporting, shipping or receiving a firearm may transport a firearm for any lawful purpose from any place where she may lawfully possess such firearm to any other place where she may lawfully possess such firearm so long as during such transportation, the firearm is unloaded and neither the firearm nor ammunition is accessible from the passenger compartment of the transporting vehicle. *See id.* s 926A.

Many activities affecting interstate commerce which would be prohibited under the Act in dispute here are not covered by the firearms regulation framework existing before the Act. For example, a licensee could otherwise buy, receive, sell or deliver in interstate commerce any "semiautomatic assault weapon" to or from a fellow licensee. *See id.* ss 922(a), (b). A licensee could sell or deliver any rifle or shotgun, including the Penn Arms Striker 12 or any semiautomatic rifle or shotgun under the definition of s 921(a)(30)(B) or (D) to any transferee whom the licensee has reason to know resides in another state that does not prohibit the weapon.

activities prohibited solely by the 1994 Act, such as the interstate sale and delivery of semiautomatic weapons between federal licensees, are the type of activities which arise out of or are connected with a commercial transaction, and when viewed in the aggregate substantially affect interstate commerce. *See Lopez*, 514 U.S. at 561; *see also Wickard*, 317 U.S. at 128-29. Moreover, since the Act does not apply to the transfer or possession of a weapon otherwise lawfully possessed on the date of the Act's effectiveness, the intrastate possession banned by the Act will virtually always arise out of an illegal manufacture or transfer of a "semi-automatic assault weapon". *See* 18 U.S.C. s 922(v)(2).

In the final analysis, however, the primary reason why appellants' point about the purpose of the Act is not well taken is because even if the interstate activities regulated by this statute are already prohibited, the intrastate activities regulated by the Act nonetheless have a substantial effect on interstate commerce. The prohibition of the intrastate activities is an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561; *see also* 1 Tribe, s 5-4, at 819-20 n.50. The congressional

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See id. s 922(b)(3). In turn, the transferee could then transport that weapon into any other state which does not prohibit that weapon. *See id.* s 926A. In addition, any licensee could sell any type of "semiautomatic assault weapon" to another person residing in his state, even if for the express purpose of the buyer using it interstate. *See id.* ss 922(a)(3), 926A. The buyer could then transport it to any other state which does not prohibit the weapon. *See id.* ss 922(a)(3), 926A. In addition, a person from any state could loan or rent a "semiautomatic assault weapon" for temporary use in lawful sporting activities in another state. *See id.* ss 922(a)(5)(B), (b)(3)(B).

testimony behind the 1994 Act demonstrated that the previous federal firearms regulation scheme and state law were being widely circumvented and were thus inadequate to allow states to control the flow of semiautomatic assault weapons across their borders. Based on the grave dangers posed by such weapons before prior federal and state laws could be enforced, Congress decided that it needed to take the additional step of stifling their manufacture and flow in interstate commerce. These circumstances necessitated a law that would prevent any commercial activity in these particularly dangerous types of guns where it began with the manufacture and interstate transfer, and where it ended with their possession in other states throughout the nation.[8]

It may be argued that congressional hearings alone are not sufficient to demonstrate that a statute is directed at regulating interstate commerce, but the Supreme Court's precedent dictates otherwise. In *Lopez*, the Supreme Court stated that it would consider legislative findings and even congressional committee findings to determine if there was a

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[8] While it may be argued that the statute sweeps too broadly by prohibiting "purely" intrastate transfers or possession of "semiautomatic assault weapons," the Supreme Court has made clear that "where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez v. United States*, 402 U.S. 146, 154 (1971) (quoting *Maryland v. Wirtz*, 392 U.S. at 193); *see also* 1 Tribe, s 5-5, at 831 n.27 (noting that if a gun was manufactured in one state and happened to be purchased by the ultimate buyer in that same state, the purchase can "affect" interstate commerce, even though it was intrastate in this one instance, in the same way that the farmer's consumption of his home-grown wheat did in *Wickard*).

rational basis for congressional action; the Court in truth did not say whether it would consider congressional hearings. *See* 514 U.S. at 562. However, there are instances where even though Congress has not made findings about any substantial effect on interstate commerce, the Supreme Court has upheld legislation under the Commerce Clause solely on the basis of congressional hearings. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-53 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 299-300 (1964).

Both *Heart of Atlanta Motel* and *McClung* involved Commerce Clause challenges to the public accommodations provisions of the Civil Rights Act of 1964, which contained no congressional findings. The Court in both cases held, as it did in *Lopez*, that Congress was not required to make formal findings in order to legislate under the Commerce Clause. *See Heart of Atlanta Motel*, 379 U.S. at 252; *McClung*, 379 U.S. at 299, 304; *see also Lopez*, 514 U.S. at 562 (noting that Congress is normally not required to make formal findings as to the substantial effects that an activity has on interstate commerce). In fact, the *Lopez* Court cited *McClung* with approval for this exact proposition. *See* 514 U.S. at 563. As with the public accommodations provisions of the Civil Rights Act of 1964, the "record" of the Violent Crime Control and Law Enforcement Act's "passage through each house is replete with evidence" of the effect of the prohibited activities on interstate commerce. *Heart of Atlanta*, 379 U.S. at 252; *McClung*, 379 U.S. at 299. Therefore, we find that in light of the extensive testimony regarding the interstate flow of semiautomatic assault weapons across state lines, that Congress had a rational basis for regulating the manufacture, transfer and possession of semiautomatic assault weapons as an exercise of the commerce power that substantially affects interstate

commerce.

Our conclusion that the Act regulates activity which has a substantial effect on interstate commerce is supported not only by testimony before the Congress that enacted it but also by the congressional findings accompanying federal firearms legislation enacted prior to the Act at issue. In 1938, Congress enacted the Federal Firearms Act, which regulated the manufacture and transfer of firearms in interstate commerce, and defined it as "[a]n Act to regulate commerce in firearms." *See* Pub. L. No. 785, 52 Stat. 1250, 1250. In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968 ("OCCSSA") and the chapter regulating firearms was titled "State Firearms Control Assistance." Pub. L. No. 90-351, 82 Stat. 197, 225. The OCCSSA contained congressional findings that: "there is a widespread traffic in firearms moving in or otherwise affecting interstate commerce, and ... the existing Federal controls over such traffic do not adequately enable the states to control this traffic within their own borders through the exercise of their police power." 82 Stat. at 225. Congress further found that "the ease with which any person can acquire firearms, ... is a significant factor in the prevalence of lawlessness and violent crime in the United States." *See id.*[9]

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[9] Appellants claim that the Gun Control Act of 1968 superseded and impliedly repeals these findings from the OCCSSA because the findings were not contained in the later Act. However, the House Report accompanying the Gun Control Act states that the Act "builds substantially on the regulatory framework contained in title IV of the Omnibus Crime Control and Safe Streets Act of 1968" and makes three major additions. *See* H.R. Rep. No. 90-1577, at 7 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4410, 4413. Since the Gun Control Act was merely extending the OCCSSA, the congressional findings were omitted as unnecessary. *See id.* at 5. The report does not make any reference to the Gun Control Act

These two findings express the widely accepted knowledge that there is a vast interstate market in firearms that makes the states unable to control the flow of firearms across their borders or to prevent the crime inevitably attendant to the possession of such weapons once inside their borders.

The congressional findings which accompanied the Gun Control Act of 1968 were even more explicit: "the principal purpose of [the Act] ... is to strengthen Federal controls over interstate and foreign commerce in firearms and to assist the States effectively to regulate firearms traffic within their borders." H.R. Rep. No. 90-1577, at 6 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4410, 4411. These congressional findings further attest to Congress' concern over a significant interstate commerce in firearms, and the need to regulate possession of firearms to control the unwanted flow of firearms across state

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repealing or superseding any part of the OCCSSA.

It is a well-established principle of statutory interpretation that implied repeals should be avoided. *See, e.g., Randall v. Loftsgaarden*, 478 U.S. 647, 661 (1986) ("repeals by implication are not favored"). Courts have "seldom, if ever, held that a federal statute is impliedly repealed," and will only find such a repeal when two statutes are in "irreconcilable conflict." *See Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996). Furthermore, this court has noted that the reason for the rule is that Congress is normally expected to be aware of its previous enactments and to provide clear statement of repeal if it intends to do so. *See Samuels v. District of Columbia*, 770 F.2d 184, 194 n.7 (citing *TVA v. Hill*, 437 U.S. 153, 189-93 (1978)). This rationale is particularly applicable here, where the two laws at issue were passed four months apart and the legislative history of the second Act specifically discusses the first Act. *See* H.R. Rep. No. 90-1577, at 6-7. The legislative report shows that not only was Congress aware of the Omnibus Act, it also did not intend to repeal the Omnibus Act's congressional findings.

lines.

The district court here found that s 922(v) is sufficiently similar to the subject matter of prior federal firearms legislation to permit the use of earlier findings to demonstrate that the activities regulated by the current Act substantially affect interstate commerce. *See* Memorandum Order and Opinion, J.A. at 69. Appellants argue that under *Lopez*, the prohibitory provisions of the Act cannot be supported by legislative findings in previous firearms legislation. In *Lopez*, the Court refused to import Congressional findings from previous firearms legislation in order to find an interstate nexus for the Gun Free School Zones Act ("GFSZA"). *See Lopez*, 514 U.S. at 563. The Court said that importing findings from previous law was "especially inappropriate" since previous enactments and findings did not address the subject matter of the ban in dispute, *i.e.*, a ban on guns in a school zone and its relationship to interstate commerce. Rather, the Court concluded, the GFSZA " 'plows thoroughly new ground and represents a sharp break with the long-standing pattern of federal firearms legislation.' " *Id.* (quoting *United States v. Lopez*, 2 F.3d 1342, 1366 (5th Cir. 1993)); *see also Lopez*, 2 F.3d at 1366-67 (noting that the GFSZA is a regulation of schools).

True, the Supreme Court's opinion in *Lopez* does not speak with sharpness or clarity in laying down a test for determining if a statute represents a break with a long-standing pattern of prior legislation. *See* 514 U.S. at 559. However, the Supreme Court's decision in *Maryland v. Wirtz*, 392 U.S. 183 (1968), overruled on other grounds by *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled* by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), is more instructive on this issue. In *Wirtz*, the Court considered a Commerce Clause challenge to the 1961

amendments to the Fair Labor Standards Act, which had itself been upheld as a valid exercise of the Commerce power in *United States v. Darby*. *See id.* at 188 (citing Darby, 312 U.S. 100 (1941)). The provision at issue in *Wirtz* extended the scope of employees covered by the Act from employees "engaged in commerce or in the production of goods for commerce" which was upheld in *Darby*, to every employee "employed in an enterprise engaged in commerce or in the production of goods for commerce" even if the particular employee did not work in the enterprise's commercial activity. *Id.* at 188. The *Wirtz* Court concluded that the constitutionality of the extended protection was settled by the Court's reasoning in *Darby*. *See id.* The Court reasoned that it was irrelevant whether the legislative history of the amendments contained a new finding that the extension affected commerce because "the original Act stated Congress' findings and purposes as of 1938. Subsequent extensions of coverage were presumably based on similar findings and purposes with respect to the areas newly covered." *Id.* at 190 n.13. Therefore, even though the amendments at issue in *Wirtz* in some sense "broke new ground," the prior findings were nonetheless held sufficient to support the constitutionality of the new amendments under the Commerce Clause.

The extension of federal regulation over "semiautomatic assault weapons" to all manufacture, transfer and possession is in our view, quite similar to the extension of the scope of employees covered by the FLSA in *Wirtz*. In *Wirtz*, the subject matter of both the original act and the amendments was employees of manufacturers engaged in interstate commerce. *See* 392 U.S. at 187. The congressional findings in the original FLSA that sub-par labor conditions in manufacture carried on in one state could cause interstate commerce to be used to

spread poor labor conditions among workers in other states, burden the flow of commerce, and constitute an unfair method of competition in interstate commerce served to adequately explain the connection between the labor conditions of the newly-protected employees and interstate commerce. *See id.* at 190. In this case, the subject matter of both the prior firearms legislation and the present Act is control over the distribution of firearms in a national market. *See Scarborough v. United States*, 431 U.S. 563, 564 (1977); *Huddleston v. United States*, 415 U.S. 814, 824 (1974) (holding that the purpose of the OCCSSA and Gun Control Act was to control the "widespread traffic in firearms"). In addition, Congress originally found a connection between the widespread traffic in firearms in interstate commerce, and the purpose of the present Act, *i.e.*, to help states adequately control that traffic across their own borders. *See* 82 Stat. at 225-26 (1968). This Act merely extends federal control over the distribution of a certain type of firearm to all manufacture, transfer and possession. To the extent that the connection to interstate commerce is not clear from the congressional hearings for the present Act, the congressional findings in prior federal firearms regulation more than adequately demonstrate that connection.

The statute at issue in *Lopez* is clearly distinguishable because it dealt not with federal control over the distribution of firearms, but with federal protection of a discrete geographical zone around a school. The congressional findings behind earlier federal firearms regulation that we have alluded to did not address the subject of gun possession around a school, rather they addressed the widespread flow of weapons across state lines and the inability of state law enforcement to regulate it. Nor did these findings explain how possession in a school zone has any connection to interstate traffic in firearms or the flow of

firearms across state lines. Finally, the statute in *Lopez* was not supported by any extensive congressional testimony addressing problems discussed in congressional findings behind earlier firearms legislation. As a result, the ban on school zone firearm possession, entirely intrastate, could not be justified as necessary to effectuate a larger scheme to control interstate traffic.

The use of congressional findings from prior federal firearms legislation to demonstrate the connection between the Act and interstate commerce is supported by the decisions of other circuits upholding the Firearms Owner Protection Act of 1986 ("FOPA"). Courts of appeals have unanimously upheld the FOPA, which makes it unlawful to "transfer or possess a machine gun."[10] 18 U.S.C. s 922(o) (1994). The FOPA is not supported by any legislative findings. *See United States v. Franklyn*, 157 F.3d 90, 95 (2d Cir. 1998); *United States v. Rybar*, 103 F.3d 273, 279 (3d Cir. 1996). Nonetheless, other circuits have held that the subject matter of FOPA is sufficiently similar to previous firearms legislation to render appropriate the importation of prior legislative findings as a reliable statement of Congress' intent in passing FOPA. *See, e.g., Franklyn*, 150 F.3d at 95; *Rybar*, 103 F.3d at 279; *Kenney*, 91 F.3d at 890; *Wilks*, 58 F.3d at 1521; *see also Knutson*, 113 F.3d at 30-31; *Beuckelaere*, 91 F.3d at 784-85 (not specifically making a finding of similar subject matter but nonetheless relying on

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[10] The Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits have all upheld the FOPA against post-*Lopez* Commerce Clause challenges. In each case, the court upheld the defendant's conviction for possession of a machine gun. In addition, the First Circuit has upheld a similar statute banning possession of firearms by juveniles. *See supra*, note 3.

congressional findings in prior acts). These cases have distinguished FOPA from the Gun Free School Zone Act in *Lopez* on the ground that the former does not represent a "sharp break" with the long-standing pattern of federal firearms legislation, but rather a continuation of the design of earlier statutes to regulate the interstate flow of firearms. *See Rybar*, 103 F.3d at 279; *Wilks* 58 F.3d at 1521 n.4. That is certainly true of this Act as well, which prohibits a particularly dangerous class of weapons from interstate commerce.

4. The Constitutional Attack Under the Bill of Attainder Clause

Appellants' argument that s 921(a)(30)(viii) and (ix) when combined with s 922(v)(1) is an unconstitutional Bill of Attainder is largely disposed of by this court's recent decisions involving the BellSouth Corporation's challenges to provisions of the Telecommunications Act of 1996. *See BellSouth Corp. v. FCC*, 162 F.3d 678 (D.C. Cir. 1998) ("*BellSouth II*"); *BellSouth Corp. v. FCC*, 144 F.3d 58 (D.C. Cir. 1998) ("*BellSouth I*"). *BellSouth II* defined the framework for modern bill of attainder analysis. Under the current interpretation of the Bill of Attainder Clause, a law is constitutionally impermissible if it both specifically singles out individuals (or businesses) and imposes punishment on them. *See BellSouth II*, 162 F.3d at 683 (citing *United States v. Lovett*, 328 U.S. 303, 315 (1946)); *see also Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 471-72 (1977) ("the Act's specificity, the fact that it refers to appellant by name does not automatically offend the Bill of Attainder Clause"). Once it is determined that a law identifies its subject with specificity, the next question is whether the statute inflicts punishment as defined by *Nixon*. *See BellSouth*

II, 162 F.3d at 684. Under *Nixon*, whether a statute inflicts a "punishment" under the Bill of Attainder Clause depends on

> (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of the burdens imposed, reasonably can be said to further non-punitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish.

See BellSouth II, 162 F.3d at 684 (quoting *Nixon*, 433 U.S. at 473, 475-76, 478).

We need not address the issue of whether the Act applies with specificity,[11] because the Act does not impose punishment on Intratec and Penn Arms as contemplated by the Bill of Attainder Clause in Article I, Section 9 of the Constitution.

The historical meaning of legislative punishment includes a death sentence, imprisonment, banishment, confiscation of property and legislative bars to participation by individuals or

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[11] Indeed, the fact that ss 921(a)(30)(A)(viii) and (ix) name not only the guns produced by appellants but also any copies or duplicates of those firearms, raises a question of whether or not the Act specifically applies to appellants. Moreover, the fact that the definition of "semiautomatic assault weapons" includes fourteen other firearms by name as well as three broad categories of pistols, rifles and shotguns is evidence that Congress was not singling out appellants, but rather aiming to prohibit an entire class of weapons.

groups in specific employments or professions. *See Nixon*, 433 U.S. at 473-74; *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984). The Act at issue in this case does not condemn appellants to death or imprisonment, but rather specifies certain conduct from which appellants must refrain in order to avoid punishment. Appellants argue that the Act operates as a legislative bar to their participation in specific employments or professions. Appellants claim that the Act prohibits them from the employment or profession of manufacturing "semiautomatic assault weapons."

Those cases in which the Supreme Court has struck down statutes which bar specific parties from employment as imposing punishment, however, are different than the present case because all involved situations in which the ban was used as a "mode of punishment ... against those legislatively branded as disloyal." *Nixon*, 433 U.S. at 474; *see United States v. Brown*, 381 U.S. 437 (1965) (statute preventing a member of the Communist Party from holding office in a labor union); *United States v. Lovett*, 328 U.S. 303 (1946) (statute cutting off salary of three named employees based on their membership in the Communist Party); *Ex Parte Garland*, 71 U.S. 333 (1866) (statute requiring attorneys to take oath that they had not aided the Confederacy before being allowed to practice in federal court); *Cummings v. Missouri*, 71 U.S. 277 (1866) (state constitution provision barring those who had aided or sympathized with the Confederacy from teaching, holding office, or serving as a trustee for a religious organization). This court in *BellSouth I* focused on the Supreme Court's opinion in *Brown* which distinguished a statute making it a crime for a member of the Communist Party to hold a position as an officer

in a labor union from section 32 of the Banking Act which prevented members of securities underwriting firms from working for banks that belong to the Federal Reserve System. *See BellSouth I*, 144 F.3d at 65 (citing *Brown*, 381 F.3d at 453-55). The court in *Brown* distinguished the two statutes on the ground that while the former statute " 'inflicted its deprivation upon the members of a group thought to present a threat to the national security' " the latter " 'incorporate[d] no judgment censuring or condemning any man or group of men.' " *See BellSouth I*, 144 F.3d at 65 (quoting *Brown*, 381 U.S. at 453-54); *see also BellSouth II*, 162 F.3d at 686 (noting that a law falls within the historical punishment of a bar to employment only where there are concerns that the restrictions it imposes violate fundamental guarantees of political and religious freedom). In this case, the ban on semiautomatic assault weapons raises no concern that Congress is singling out appellants for punishment because they are disloyal or disfavored. Congress has rather singled out certain weapons as dangerous and disproportionately linked to crime. Therefore, the Act's prohibition of the specific weapons manufactured by appellants does not fall within the historical meaning of punishment.

Even if a statute does not fall within the historical definition of a punishment, this court must apply the second prong of Nixon, which requires that a nonpunitive legislative purpose is served by the legislation. *See BellSouth I*, 144 F.3d at 65. The purpose of this requirement is to "prevent Congress from circumventing the clause by cooking up new-fangled ways to punish disfavored individuals or groups." *Id.* This approach recognizes that merely because a regulation is burdensome does not mean that it constitutes punishment. For example, the

Supreme Court has upheld a statute prohibiting convicted felons from serving as officers of a waterfront union. *See DeVeau v. Braisted*, 363 U.S. 144 (1960). The Court reasoned that even though the statute placed a burden on convicted felons, it did not seek to punish them but rather to devise an effective scheme to regulate waterfront criminal activity. Since the goal of the legislative scheme was to improve the integrity of waterfront commerce, exclusion of individuals previously convicted of a felony was a legitimate means to that end. *See id.* at 160. Similarly, although the Act in this case does place a particular burden on appellants, the legislative history of the Act shows that the intent of the Act was not to inflict punishment on appellants, but rather to reduce the availability of semiautomatic assault weapons, prevent the flow of such weapons into states with laws prohibiting them, and reduce the violent crime disproportionately associated with these types of guns. *See* H.R. REP. NO. 103-489, at 1-2 (1994). In addition, Congress' inclusion of copies and duplicates of the guns made by appellants, fourteen other guns by name and three broad categories of pistols, rifles and shotguns in the definition of "semiautomatic assault weapon" indicates that it was aiming not to punish appellants, but rather to regulate an entire class of weapons. *See* 18 U.S.C. s 922(a)(30). The text and legislative history of the Act therefore demonstrate that the Act serves a legitimate nonpunitive purpose.

The final prong of the *Nixon* test is whether the legislative record indicates a legislative intent to punish. The case law instructs that under this prong, appellants must show "'unmistakable evidence of punitive intent.' " *See BellSouth I*, 144 F.3d at 67 (quoting *Selective Serv. Sys.*, 468 U.S. at 856 n.15. Moreover, isolated statements are not sufficient to show

a punitive intent. *See Selective Serv. Sys.*, 468 U.S. at 856 n.15; *see also BellSouth I*, 144 F.3d at 67 (requiring "'smoking gun' evidence of congressional vindictiveness" to justify finding punitive intent). Appellants note that in a footnote the House Report summarizing the Act lists all of the semiautomatic weapons that are specifically listed in the statute. *See* H.R. REP. NO. 103-489, at 20 n.35. Furthermore, appellants point out that they are repeatedly named in the floor debates as the manufacturers of banned weapons. These allegations fall well short of the type of evidence required to show a legislative intent to punish. In *BellSouth I*, this court held that even a few scattered remarks referring to anti-competitive abuses committed by baby-Bells in the past were insufficient to show the necessary legislative intent to punish. *See* 144 F.3d at 67. The statements appellants complain of do not rise to the statements in *BellSouth I*. In *BellSouth I*, the statement singled out specific bad acts by the party, indicating the possibility that the speaker had found fault with the baby-Bell. Here, the mere mention of appellants' guns in the House Report and their names in the floor debates do not so much suggest an intent to punish as represent mere recitals of the content of the Act itself. This is far from the unmistakable evidence of punitive intent required by the Supreme Court in *Selective Serv. Sys.* *See* 468 U.S. at 856 n.15.

Therefore, since the prohibition effectuated by the Act neither falls within the historical meaning of punishment, nor exhibits a purely punitive purpose, nor manifests a congressional intent to punish appellants, it does not constitute an

unconstitutional Bill of Attainder.[12]

III. Conclusion

We hold that section 110102 of the Violent Crime Control and Law Enforcement Act of 1994 is within Congress' Commerce Clause power and does not constitute an unconstitutional Bill of Attainder. The district court's decision granting the government's motion for summary judgment is therefore

Affirmed.

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[12] Finally, appellants argue that the *BellSouth* cases and the *Nixon* test should be inapposite here because the statute at issue imposes a criminal penalty whereas the statutes in *BellSouth*, *Nixon* and previous Bill of Attainder cases did not. *See* Appellants' Reply Br., at 19-20. However, appellants are unable to point to any authority nor give a rational justification for this distinction. Rather, appellants argue that since the Act imposes a criminal penalty, it automatically satisfies the punishment requirement of a bill of attainder. Yet nowhere in *Nixon* or the cases subsequent to it is there indication that the *Nixon* test doesn't apply to a statute that imposes criminal penalties. Furthermore, appellants' argument is disproved by *United States v. Brown*, 381 U.S. 437 (1965), which also involved a statute imposing a criminal penalty. *See id.* at 438. In *Brown*, the Court applied the same factors as *Nixon* when it inquired into the question of punishment by first considering the historical gloss on the meaning of punishment, and next determining whether the purpose of the Act was punitive or non-punitive. *See id.* at 458-59. The Court's analysis in *Brown* demonstrates that the factors used in the *Nixon* test for punishment under the Bill of Attainder Clause apply with equal force to both civil and criminal statutes. Indeed, the mere fact that *Nixon* cites *Brown* as determining whether punitive or nonpunitive objectives underlie a law is strong evidence that the *Nixon* Court did not believe that a different test applied to a statute which imposed a criminal penalty, as was the case in *Brown*. *See* 433 U.S. at 475-76 n.40.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NAVEGAR, INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	Civil No. 95-550 (RCL)
	)	
Defendant.	)	
	)	

ORDER

For the reasons set forth in the accompanying memorandum opinion, defendant's Motion for Summary Judgment is hereby GRANTED and plaintiffs' Motion for Summary Judgment is hereby DENIED. This case now stands DISMISSED WITH PREJUDICE.

SO ORDERED.

Royce C. Lamberth
United States District Judge

Date: 8-31-98

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NAVEGAR, INC., et al.,)
)
Plaintiffs,)
)
v.)
)
UNITED STATES)
OF AMERICA,) Civil No. 95-550 (RCL)
)
Defendant.)
)
)

MEMORANDUM OPINION

This matter comes before the court on defendant's and plaintiffs' cross-motions for summary judgment on the issue of the constitutionality of certain provisions of the Violent Crime Control and Law Enforcement Act of 1994. Rule 56(c) of the Federal Rules of Civil Procedure provides that "summary judgment shall be rendered forthwith if . . . there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Upon consideration of the submissions of the parties and the relevant law, plaintiffs' motion for summary judgment is denied and defendant's motion for summary judgment is granted.

I. *Factual and Procedural History*

On March 3, 1995, federally licensed firearm manufacturers Navegar, Inc. ("Intratec") and Penn Arms, Inc. ("Penn Arms") filed a complaint in this court seeking a declaratory judgment that certain provisions of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 ("the Act"), were outside of Congress' enumerated powers, unconstitutional bills of attainder, and vague in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution. The facts leading up to plaintiffs' challenges to the Act are fully set forth in *Navegar, Inc. v. United States*, 914 F. Supp. 632, 633-35 (D.D.C. 1996).

The government filed a motion for summary judgment asserting that plaintiffs' pre-enforcement constitutional challenge to certain provisions of the Act did not constitute a justiciable controversy under Article III as plaintiffs failed to demonstrate a genuine threat of prosecution. Upon consideration of the arguments presented, this court granted the government's motion and dismissed plaintiffs' case. *Id.* at 637.

Plaintiffs appealed the decision of this court to the Court of Appeals for the District of Columbia Circuit. *Navegar, Inc. v. United States*, 103 F.3d 994 (D.C. Cir. 1997). The Court of Appeals first considered the justiciability of the plaintiffs' challenges to the sections of the Act specifically mentioning firearms produced by Intratec and Penn Arms by name. By its terms, the Act makes it unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon." 18 U. *S. C.* 5 922 (v) (1) . "Semiautomatic assault weapon' is defined to include 'any of the firearms, or copies or duplicates of the firearms in any caliber, known as . . . INTRATECTEC-9, TEC-

DC9 and TEC-22, and . . . revolving cylinder shotguns, such as (or similar to) the Street Sweeper and Striker 12." *Id.* § 921(a)(30)(A). In effect, these portions of the Act make it unlawful to manufacture or transfer Intratec's "TEC-9," "TEC-DC9," and "TEC-22" models, and Penn Arms' "Striker 12" model. *Id.* §§ 922(v)(1), 921(a)(30)(A)(viii) & (A)(ix). Because of the weapon specific nature of these sections, the Court of Appeals considered plaintiffs' challenges to these provisions separately from the challenges based on the generally worded provisions of the Act.

The Court of Appeals reversed this court's conclusion dismissing plaintiffs' pre-enforcement challenge to these provisions of the Act for lack of a justiciable controversy. *Navegar*, 103 F.3d at 999-1001. The Court of Appeals noted that the Act effectively singles out both Intratec and Penn Arms as intended targets by prohibiting the production of weapons that only these companies manufacture. The Court of Appeals commented that "the applicability of the statute to appellants' business [is] indisputable. If these provisions of the statute are enforced at all, they will be enforced against these appellants for continuing to manufacture and sell the specified weapons." *Id.* at 1000. For this reason, the Court of Appeals determined that the imminent threat of prosecution could be deemed speculative only if it was likely that the government would simply decline to enforce these provisions of the Act-a conclusion that the Court of Appeals was unwilling to reach. As such, plaintiffs demonstrated an imminent threat of prosecution under this portion of the Act and the controversy as ripe for adjudication. Thus, the Court of Appeals was satisfied that the controversy was justiciable.

A contrary conclusion was reached by the Court of Appeals with respect to plaintiffs, pre-enforcement challenges

to those portions of the Act identifying prohibited materials by general characteristics only. Plaintiffs sought to challenge the constitutionality of other portions of the Act referring to weapons and accessories sharing certain features, rather than to particular brands and models of weapons. Specifically, plaintiffs alleged that the Act exceeded the powers of Congress enumerated in the Constitution and that the Act was too vague to comply with the Due Process Clause of the Fifth Amendment to the Constitution. The enumerated powers claim presented by plaintiffs challenged the portion of the Act outlawing "large capacity ammunition feeding devices," defined as ammunition magazines "that ha[ve] a capacity of . . . more than 10 rounds of ammunition." 18 U. S. C. §§ 922 (w) (1) and 921 (a) (31). Plaintiffs' vagueness claims were centered on the portions of the Act that prohibited firearms "known as . . . revolving cylinder shot-guns," 18 U.S.C. § 921(a)(30)(A)(ix), and semiautomatic pistols that have two out of five listed characteristics. 18 U.S.C. § 921 (a) (30) (C).

The Court of Appeals agreed with this court's conclusion that plaintiffs were unable to show an imminent threat of prosecution under the portions of the Act describing the outlawed items in general categorical terms and thus, the challenges to these portions of the Act were determined to be non-justiciable at that time. *Navegar*, 103 F.3d at 1001-02.

Upon remand to this court, plaintiffs sought leave to amend their complaint in an effort to demonstrate their challenges to the generic portions of the Act were justiciable in light of the Court of Appeals' prior decision in this case. After considering plaintiffs' motion to amend their complaint, this court concluded that the information contained in plaintiffs' Proposed Second Amended Complaint failed to establish that plaintiffs would have standing to assert a pre-enforcement

challenge to the constitutionality of the generic portions of the Act. This court further held that plaintiffs failed to make any showing that they faced a greater or more imminent threat of prosecution than did other manufacturers of the products covered by the terms of the Act.

Because this court denied plaintiffs' motion to amend their complaint, plaintiffs' pre-enforcement constitutional challenge to the generic provisions of the Act identifying prohibited materials by characteristics only remained dismissed. Plaintiffs and the government have since filed cross-motions for summary judgment on the remaining constitutional challenges to the weapon-specific portions of the Act.

II *The Violent Crime Control and Law Enforcement Act of 1994*

The Gun Control Act of 1968, as amended, 18 U.S.C. §§ 921-30 ("GCA"), imposes a comprehensive regulatory scheme on the manufacture and distribution of firearms. On September 13, 1994, Congress passed the Violent Crime Control and Law Enforcement Act of 1994, which amends § 922 of Title 18, United States Code, and makes it unlawful to "manufacture, transfer, and possess a semiautomatic assault weapon." 18 U.S. C. § 9 2 2 (v) (1) . The Act is to be in effect for a period of ten years from the date of its enactment in 1994 and effectively maintains the number of legal assault weapons in private hands at the 1994 level.

The term "semiautomatic assault weapon" is defined as any of the firearms known by nine categories of specified brand

names or model numbers,[1] including "any of the firearms, or copies or duplicates of the firearms in any caliber, known as... INTRATEC TEC-9, TEC-DC9 and TEC-22; and revolving cylinder shotguns, such as (or similar to) the Street Sweeper and Striker 12." *Id.* § 922(a)(30)(A). Another section of the Act defines prohibited firearms by generic features, including semiautomatic rifles that have "an ability to accept a detachable magazine' and have at least two of five other specified characteristics. *Id.* § 921 (a) (30) (C) .

In § 922(w)(1) of the Act, the transfer or possession of any "large capacity ammunition feeding device" is outlawed for a period of ten years. Section 921(a)(31)(A) defines such devices to include ammunition magazines manufactured after

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[1] 18 U.S.C. S 921(a)(30)(A) provides:

(30) The term "semiautomatic assault weapon" means-

(A) any of the firearms, or copies or duplicates of the firearms in any caliber, known as-

(i) Norinco, Mitchell, and Poly Technologies Avtomat Kalashnikovs (all models);

(ii) Action Arms Israeli Military Industries UZI and Galil;

(iii) Beretta Ar7O (SC-70);

(iv) Colt AR-15;

(v) Fabrique National FN/FAL, FNLAR, and FNC;

(vi) SWD M-10, M-11, M-11/9, and M-12;

(vii) Steyr AuG;

(viii) INTRATEC TEC-9, TEC-DC9 and TEC-22; and

(ix) revolving cylinder shotguns, such as (or similar to) the Street Sweeper and Striker 12.

the date of the enactment of the Act, which can hold more than ten rounds of ammunition.[2] *Id.* §§ 922(w)(1), 921 (a)(31).

The Act contains various exceptions to the general prohibitions. The Act provides exemptions for the transfer of the proscribed assault weapons to government agencies and law enforcement officers, *Id.* § 922(v)(4) & (w)(3), and for export of the weapons under certain conditions. The Act also contains a ."grandfather" provision that permits the possession or transfer of semiautomatic weapons and large capacity ammunition feeding devices that were lawfully possessed on the date of enactment of the Act. *Id.* §§ 922(v)(2) & 922(w)(2). Persons convicted of knowingly violating these provisions are subject to fines and prison sentences of up to five years. *Id.* § 924(a)(1).

Because plaintiffs contend that neither the Act's language nor its legislative history offers a clear explanation of its nexus between the banning of assault weapons and interstate commerce, plaintiffs submit that the Act exceeds Congress's enumerated powers as set forth in Article I of the Constitution.

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[2] 18 U.S.C. S 921(a)(31) provides:

The term "large capacity ammunition feeding device'-

(A) means a magazine, belt, drum, feed strip, or similar device manufactured after the date of enactment of the Violent Crime Control and Law Enforcement Act of 1994 that has a capacity of, or that can be readily restored or converted to accept, more than 10 rounds of ammunition; but

(B) does not include an attached tubular device designed to accept, and capable of opening only with, .22 caliber rimfire ammunition.

Plaintiffs also assert that the weapon-specific nature of the Act demonstrates that the Act is an unconstitutional Bill of Attainder.

III. *Whether § 922(y)(1) Constitutes a Valid Exercise of Congress's Legislative Authority Pursuant to the Commerce Clause*

The Constitution vests in Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.' U.S. Const. , Art. I, § 8, cl. 3. The Commerce Clause is a grant of plenary authority to Congress. *See Hodel v. Virginia Mining and Reclamation Ass'n. Inc.*, 452 U.S. 264, 276 (1981); *Cleveland v. United States*, 329 U.S. 14, 19 (1946). For over sixty years, Congress has relied on this constitutionally enumerated power to impose controls on the flow of firearms and ammunition in interstate and foreign commerce in an effort to assist the States in reducing and preventing violent crime. While Congress's authority to regulate such commerce pursuant to the Commerce Clause has been determined to be far reaching, it is not without limit.[3] As stated, plaintiffs assert that § 922(v)(1) exceeds Congress's power to legislate under the Commerce Clause standard established by the Supreme Court in *United States v. Lopez*, 514 U.S. 549 (1995). However, as will be discussed

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[3] *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968) (reaffirming that "the power to regulate commerce, though broad indeed, has limits" that "[t]he Court has ample power" to enforce), *overruled on other grounds, National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by, Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 833 (1985).

below, the historically pervasive regulation of firearms by Congress considered in conjunction with the scope of the Commerce Clause power set forth by the Supreme Court in *Lopez* leaves little room for doubt that the congressional prohibition of the "manufacturing, transferring, or possessing a semiautomatic assault weapon," within the limits of § 922 (v) (1) of the Act constitutes a constitutionally valid exercise of Congress's legislative authority.

A. *The Scope of Congress's power to Regulate Interest Commerce*

The breadth of Congress's authority to legislate pursuant to the Commerce Clause was first recognized by Chief Justice Marshall in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). The commerce power, in Chief Justice Marshall's opinion, was not to be restricted by the judiciary. Indeed, Congress's power in this area reaches "that commerce which concerns more States than one." *Id.* at 194. The power itself was defined as "the power to regulate; that is, to proscribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Id.* at 196.

In determining the scope of congressional power to regulate interstate commerce, the commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *NLRE v. Jones &*

Lauahlin Steel Corp., 301 U.S. 1, 37 (1937). This limitation is admittedly slight, taken even to its most outer limits-the commerce power "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legislative end, the effective exertion of the granted power to regulate interstate commerce." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942).

In essence, whether a particular exercise of congressional power is valid under the Commerce Clause is a relatively narrow and deferential inquiry. In *Hodel*, the Supreme Court succinctly explained that, in most instances, the inquiry is twofold. 492 U.S. 264 (1981). "The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding." *Hodel*, 452 U.S. at 276 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964)).[4] "This established, the only remaining question for judicial inquiry is whether 'the means chosen by [Congress) must be reasonably adapted to the end permitted by the Constitution.'" (quoting *Heart of Atlanta Motel*, 379 U.S. at 262). Once the court determines that Congress acted rationally in adopting a

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[4] In *Katzenbach*, the Supreme Court explained that "the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." 379 U.S. at 303-04.

particular regulatory scheme, the inquiry is at an end. *Id.*

The Supreme Court recently offered a detailed examination of its decisions defining the extent of congressional authority to legislate pursuant to the Commerce Clause. In *Lopez v. United States*, the Supreme Court invalidated the Gun-Free School Zones Act of 1990, which made it unlawful "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922 (q) (2) (A) . 514 U.S. at 561. The Act defined a "school zone" as "in or on the ground of, a public, parochial, or private school; or within a distance of 1,000 feet from the grounds of [such] a . . . school." *Id.* § 921 (a) (25) . Because this Act neither regulate[d] a commercial activity nor contained a requirement that the possession be connected in any way to interstate commerce," *Lopez*, 524 U.S. at 551, the Court concluded that Congress exceeded the "outer limits" of its authority to legislate pursuant to the Commerce Clause.

The Court in *Lopez* identified the three broad categories of activity that Congress may regulate pursuant to its commerce power: (1) "the use of the channels of interstate commerce;" (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and (3) activities "that substantially affect interstate commerce." 514 U.S. at 558-59. These categories were first laid out by the Court in *Perez v. United States*, 402 U.S. 146, 150 (1971).

In considering the authority of Congress to enact § 922(q), the Court quickly rejected the first two categories set forth above. The refusal to consider the Act under the first two categories was based on the Court's determination that section 922 (q) was not "a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the

interstate transportation of a commodity through the channels of commerce; nor can § 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. *Lopez*, 514 U. S. at 559. Accordingly, the Court considered, in depth, only whether the Gun Free School Zones Act could be considered a regulation of an activity that substantially affected interstate commerce. The Court held that it could not.

The conclusion in *Lopez* was based, in part, on the Court's determination that the possession of guns within school zones was neither commercial in nature nor an essential part of a larger regulation of commercial activity, that the statute did not contain a jurisdictional element to ensure on a case-by-case basis that the gun in question was connected with interstate commerce, and that Congress made no findings about the effect gun possession in school zones has on interstate commerce. *Id.* at 559-63. The Court also rejected the government's theories linking the possession of a firearm in a school zone to interstate commerce. *Id.* at 563-64. Therefore, in the absence of evidence to support the conclusion that Congress had a rational basis for finding that gun possession within school zones had a substantial effect on interstate commerce, the Court declared the statute unconstitutional. *Id.* at 559.

B. *Analysis of § 922(v)(1)*

Like the statute at issue in *Lopez*, § 922(v)(1) of the Violent Crime Control and Law Enforcement Act contains no jurisdictional nexus element specifically linking the manufacture, transfer, or possession of assault weapons with interstate commerce and does not include express congressional findings regarding the effect of the prohibited activity on interstate

commerce. However, nothing in the *Lopez* opinion or in any other aspect of the Supreme Court's Commerce Clause jurisprudence makes the inclusion or absence of either of these dispositive.

The Court of Appeals for the District of Columbia Circuit has expressly rejected the argument that a federal criminal statute must contain a jurisdictional element. In *Terry v. Reno*, the Court of Appeals rejected a constitutional challenge to the Freedom of Access to Clinic Entrances Act ("Access Act") which prohibited the use of threat of force or physical obstruction against a person seeking to obtain or provide reproductive health services. 101 F.3d 1412 (D.C. cir. 1996). Plaintiffs in that case contended that the Access Act exceeded Congress's authority under the Commerce Clause because the statute lacked a jurisdictional element. *Id.* at 1418. The Court of Appeals clearly stated that the holding in *Lopez* did not mandate that federal criminal statutes must contain a jurisdictional element, *id.*, and further reasoned that "[i]f a jurisdictional element were critical to a statute's constitutionality, the Court in *Lopez* would not have gone on to examine the Government's proffered rationales for the constitutionality of the gun possession statute." *Id. See also United States v. Wilson*, 73 F.3d 675, 685 (7th Cir. 1995) ("In discussing the lack of a jurisdictional element in *Lopez*, the Court simply did not state or imply that all criminal statutes must have such an element, or that all statutes with such an element would be constitutional, or that any statute without such an element is per se unconstitutional.").

The lack of express congressional findings regarding the effect of the prohibited activity on interstate commerce is also not determinative of the issue before the court. Congress's power to legislate does not flow from the legislative findings it

may make on a given issue; rather, it flows from the Constitution. The constitutionality of a statute simply cannot turn on the existence (or lack thereof) of legislative findings on a particular issue upon which Congress has chosen to legislate. As the Supreme Court stated in *Lopez*, "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce." 514 U.S. at 562. *See Perez*, 402 U.S. at 156; *McClung*, 379 U.S. at 304.[5] *See also Heart of Atlanta Motel*, 379 U.S. at 252 (upholding Title II of the Civil Rights Act of 1964 despite absence of congressional findings).

Perhaps the clearest expression of this principle is Justice Powell's concurrence in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). In that case, contracting associations brought suit challenging an affirmative action provision in § 103(f)(2) of the Public Works Employment Act of 1977. These associations asserted, in part, "that a reviewing court may not look beyond the legislative history of the PWEA itself for evidence that Congress believed that it was combating invidious discrimination." 448 U.S. at 502 (Powell, J., concurring). In his concurrence, Justice Powell reasoned that this position would essentially require Congress to make specific factual findings with respect to all legislative actions undertaken and would ignore the institutional expertise Congress may have gained in a particular area. He further elaborated that:

Congress is not expected to act as though it were duty

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[5] The Court simply commented that legislative findings may have significant relevance where they would aid judicial consideration of 'the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye.' *Lopez*, 514 U.S. at 563.

> bound to find facts and make conclusions of law. The creation of national rules for the governance of our society simply does not entail the same concept of recordmaking that is appropriate to a judicial or administrative proceeding. Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in an area.

Id. at 502-03.

Although not required to specifically elaborate on the substantial affect a regulated activity has on interstate commerce in order to legislate, it is appropriate to defer to a congressional finding that a certain activity substantially impacts interstate commerce. However, courts may not resort to "pil[ing] inference upon inference" to establish the existence of such an impact in the absence of an express finding. As stated, the Court in *Lopez*, rejected the government's attenuated explanation linking possession of a firearm in a school zone to interstate commerce. 514 U.S. at 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."). The Court noted that to accept the

argument proffered by the government would in effect make it "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign." *Id.* at 564. Accordingly, section 922(v) (1) "must bear more than a generic relationship several steps removed from interstate commerce, and it must be a relationship that is apparent, not creatively inferred." *United States v. Kenney*, 91 F.3d 884, 888 (7th Cir. 1996).

In examining whether § 922(v)(1) of the Violent Crime Control Act exceeds Congress's authority under the Commerce Clause, this court notes that the reasoning employed by the Court of Appeals for the Seventh Circuit in *United States v. Kenney* is persuasive. In that case, the Court of Appeals considered a challenge nearly identical to the one presently presented by plaintiffs in the instant case to § 109(9) of the Firearm owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449, 452-53, codified at 18 U.S.C. S 922(o). This statute also amended the Gun Control Act of 1968 and made it unlawful to transfer or possess a machine gun. As in the instant case, the statute itself contained no congressional findings and no jurisdictional nexus element linking the prohibited conduct to interstate commerce. Notwithstanding these factors, the Court of Appeals joined every other Circuit to have considered the issue in concluding that Congress did not exceed its authority under the Commerce Clause in banning the transfer and possession of machine guns. *See e.g., United States v. Bailey*, 123 F.3d 1381 (11th Cir. 1997); *United States v. Wright*, 117 F.3d 1265 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 384 (1998); *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996), *cert. denied*, 118 S. Ct. 48 (1997); *United States v. Beuckelaere*, 91 F.3d 781 (6th Cir. 1996); *United States v. Kirk*, 70 F.3d 791

(5th Cir. 1997), *aff'd by equally divided en banc panel*, 105 F.3d 997 (5th Cir.) (per curiam), *cert. denied*, 118 S. Ct. 47 (1997); *United States v. Rambo*, 74 F.3d 948 (9t@ Cir.), *cert. denied*, 117 S. Ct. 72 (1996); *United States v. Wilks*, 58 F.3d 1518 (10th Cir. 1995).

The Court of Appeals in *Kenney* determined that the statute would be best analyzed under the third *Lopez/Perez* category-whether the transfer and possession of a machine gun was an activity having a substantial affect on interstate commerce. The Court of Appeals reasoned that § 922(o) could not be properly categorized as a regulation of a "channel of interstate commerce" based on the conclusion that in *Lopez* and *Perez*, each statute cited by the Supreme Court and identified as being upheld as a regulation of a channel of interstate commerce was a *direct* regulation of interstate commerce as evidenced by an explicit jurisdictional nexus element. According to the Court of Appeals, this category could only justify section 922(o) to the extent that the statute regulated interstate transfers and possessions of machine guns. Moreover, the Court of Appeals noted that "although it may be true that Congress must regulate intrastate transfers and even mere possessions of machine guns in aid of its prerogative of preventing the misuse of the channels of interstate commerce, the regulation still regulates much more than the channels of interstate commerce." *Id.* at 889. In the view of the Court of Appeals, the statute at issue clearly covered more than would legislation designed to regulate the channels of interstate commerce. *Compare Rambo*, 74 F.3d at 952 ("[T]he ban on such possession is an attempt to control the interstate market for machineguns."); *Kirk*, 70 F.3d at 785-86 (concluding that the § 922(o) falls into either the first or second *Lopez/Perez* category and stating that "there could no unlawful possession . . . without an unlawful transfer").

The Court of Appeals also declined to rely on the second category identified in *Lopez* and *Perez*—the regulation of things or persons in or instrumentalities of interstate commerce, for similar reasons. The Court of Appeals again cited examples of cases identified by the Supreme Court as falling within this category and again concluded that this category could provide only partial support for § 922(o). The nexus between the prohibited activity and interstate commerce in those cases was identified as "explicit and obvious in each case." *Kenney*, 91 F.3d at 889. The Court of Appeals in *Kenney* rejected the Tenth Circuit's observation that "[t]he interstate flow of machineguns not only has a substantial effect on interstate commerce; it is interstate commerce." *Wilks*, 58 F.3d at 1521, as this observation failed to contemplate the different question of the propriety of § 922(o)'s regulation of purely *intrastate* possession and transfer. *Kenney*, 91 F.3d at 889.

The Court of Appeals conceded that § 922(o) was a congressional effort to regulate the whole of an economic activity-the trade in machine guns. With this in mind, the Court of Appeals appropriately recognized that Congress's authority to legislate pursuant to the Commerce Clause extended to purely intrastate activities when such activities threaten Congress's ability to regulate interstate commerce. However, the Court of Appeals concluded that "[p]ermitting unregulated intrastate possessions and transfers of machine guns . . . *indirectly* undermines . . . the effectiveness of the federal attempt to regulate interstate commerce," and therefore, "the intrastate activity 'affects' the interstate commerce[] in an attenuated way that raises the *Lopez* concern of whether such effect is 'substantial'." *Id.* at 890 (emphasis supplied).

Upon determining that section 922(o) could not be

considered legislation failing within either the first or second *Lopez/Perez* categories, the Court of Appeals concluded that the statute was within the limits of the third category because the transfer or possession of machine guns had a substantial impact on interstate commerce. In reaching this conclusion, the Court of Appeals recognized that unlike the banning of firearms within one thousand feet of a school, the banning of the transfer or possession of machine guns was 'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Kenney*, 91 F.3d at 890 (quoting *Lopez*, 514 U.S. at 561). The Court of Appeals likened the possession of a machine gun to the Supreme Court's consideration of the harvesting and consumption of wheat by a single farmer in *Wickard v. Fillburn*. *Kenney*, 93 F.3d at 890. In *Wickard*, Congress's power to legislate pursuant to the Commerce Clause was considered to extend to this purely intrastate commercial activity because of the prohibited activity exerted a substantial effect on interstate commerce. *Wickard v. Fillburn*, 317 U.S. 111, 125 (1942).

The Court of Appeals also distinguished the ban considered in *Lopez* on the grounds that the ban on transfer and possession of machine guns did not "plow[] thoroughly new ground and represent[] a sharp break with the long-standing pattern of federal firearms legislation." *Lopez*, 514 U.S. at 563. For this reason, the Court of Appeals concluded it was proper to examine the legislative history and findings of other congressional statutes regulating firearms. "In light of [those] findings and enactments, the 1986 addition of § 922(o) was not novel but incremental, merely preventing further growth in the number of machine guns in private hands as an exercise of the historic federal interest in the regulation of machine guns." *Kenney*, 91 F.3d at 890-91. In sum, the nature of the statute

and the history of the federal firearms legislation led the Court of Appeals to conclude that § 922(o) was a constitutional exercise of Congress's authority to legislate pursuant to the Commerce Clause. *See Wright*, 117 F.3d at 1270 (reaching the same conclusion); *Rybar*, 103 F.3d at 283-84 (same).

The well-reasoned and thoughtful analysis relied on by the Court of Appeals in *Kenney* is instructive on the issue presently before this court. This court's own review of the cases and statutes traditionally considered by the Supreme Court to fall within the first two categories identified in *Lopez* and *Perez* demonstrates that § 922(v)(1), like § 922(o), cannot properly be viewed as falling within either of these categories.

1. *Regulation of the Channels of Interstate Commerce*

Without question, the clearest exercise of Congress's authority to regulate the use and channels of interstate commerce can be identified in statutes which contain an explicit jurisdictional nexus element. Frequently cited examples of such statutes include the prohibition of interstate transportation or shipment of: stolen goods, 18 U.S.C. § 2312-2315; kidnaped persons, 18 U.S.C. § 1201; prostitutes; 18 U.S.C. § 2421; and drugs, 21 U.S.C. § 841(a). *See also United States v. Robertson*, 514 U.S. 669, 670-72 (1995) (affirming conviction under federal RICO statute because gold mine was "engaged in commerce"); *United States v. Darby*, 312 U.S. 100, 105 (1941) (upholding statute making unlawful the interstate shipment of goods produced by workers whose wages violated the Fair Labor Standards Act). In light of the fact that each statute and case cited by the Supreme Court in *Lopez* and *Perez* as falling within this category contains a jurisdictional nexus element, it is reasonable to interpret this category as being restricted "to

legislation that specifically reaches interstate transfers, possessions, and transactions and businesses 'engaged in commerce.'" *Kirk*, 105 F.3d 997, 1008 (5th Cir. 1997) (Jones, J., dissenting).

The broadest reading of Congress's authority to regulate the use of the channels of interstate commerce can be found in the Supreme Court's opinion in *Heart of Atlanta Motel*. In this case, the Court upheld the constitutionality of Title II of the Civil Rights Act of 1964. Section 201(a) of Title II made it unlawful for public accommodations "*affecting commerce*" to discriminate or segregate on the basis of race, color, religion, or national origin. In elaborating on Congress's power to legislate pursuant to the Commerce Clause, the Court stated:

> [T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.

379 U.S. at 256 (quoting *Caminetti v. United States*, 242 U.S. 470, 491 (1917)).

While it is not a far stretch to conclude that the interstate manufacture, transfer, and possession of assault weapons may very well constitute an immoral and injurious use of interstate commerce, § 922(v)(1), in effect, simply reaches more than the channels of interstate commerce alone. Indeed, given the absence of a jurisdictional nexus element, the statute prohibits purely intrastate possession and transfer of assault weapons. Although it has been clearly established that Congress may regulate purely local activity in furtherance of its power to regulate the channels of interstate commerce, *see, e.g.*, *Darby*, 312 U.S. at 118, the reach of § 922(v)(1) extends beyond this category by potentially criminalizing assault

weapons that have never been a part of interstate commerce. As the Court of Appeals in *Kenney* reasoned, the breadth of the statute is therefore an aspect of Congress's broader power to regulate things 'affecting' interstate commerce." 91 F.3d at 889. Furthermore, the government has offered no explanation regarding how intrastate possession or transfer of an assault weapon is necessary as a means to regulate a particular channel of interstate commerce. *Compare Heart of Atlanta Motel*, 379 U.S. at 258 (concluding it was lawful for Congress to prohibit discrimination in local public accommodations because such discrimination affected interstate travel). As such, it is the conclusion of this court that § 922(v)(1) cannot properly be considered a regulation of the channels of interstate commerce.[6]

2. *Regulation of Instrumentalities of Interstate Commerce or sons in Interstate Commerce*

It would require an equally strained interpretation of the second *Lopez/Perez* category were this court to uphold § 922(v)(1) as a regulation of an instrumentality of interstate commerce, or of persons or things in interstate commerce, despite the fact that Congress's power extends to the regulation of instrumentalities uneven though the threat may come only from intrastate activities." *Lopez*, 514 U.S. at 558. As the cases and statutes cited by the Supreme Court in *Lopez* reveal, this category includes regulation of instrumentalities or things

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[6] Contrary to the Court of Appeals' determination in *Kenney* that § 922(o) did not fall within the first *Lopez/Perez* category, some Courts of Appeals have reached an opposite conclusion. *See, e.g., Beuckalaere*, 91 F. 3d at 786-87; *Rambo*, 74 F. 3d at 952.

as they move through interstate commerce and the nexus between the regulated instrumentality or thing and interstate commerce is therefore clearly evident in each case. The Court has cited the regulation of the destruction of aircraft, 18 U.S.C. § 32, thefts from interstate shipments, 18 U.S.C. § 659, the *Shreveport Rate Cases*, 234 U.S. 342 (1914) (upholding authority of Congress to regulate rail rates), and *Southern Ry, Co. v. United States*, 222 U.S. 20, 32 (1911) (upholding authority of Congress to regulate rail cars), as examples of the exercise of congressional authority coming within this category. The Court has also determined that interstate roads and toll roads and drawbridges connecting interstate roads are instrumentalities of interstate commerce because these things are necessary to the transport of persons and goods moving in interstate commerce. *See Alstate Const, Co. v. Durkin*, 345 U.S. 13 (1953) (interstate roads); *Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943). *See also United States v. Cobb*, 144 F.3d 319, 322 (1998) (discussing the second *Lopez* category).

To the extent that an assault weapon constitutes a "thing" actually traveling from state to state via an instrumentality of interstate commerce, § 922(v)(1) would constitute a valid exercise of Congress's authority pursuant to the Commerce Clause and this exercise of authority would seem to fit squarely within this second category. It is clear, however, that S 922(v)(1) extends much further than simply regulating assault weapons in this fashion in its prohibition of purely intrastate possession of assault weapons.[7]

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[7] In reaching the conclusion that § 922(q) did not fall within the second category, the Court in Lopez seemed to suggest that the second category was limited to "things or persons" as they move through

Although the government submits that intrastate possession or transfer of an assault weapon can be properly considered a 'thing" in interstate commerce because such possession may threaten the instrumentalities of interstate commerce, it is clear that the second category was not intended to extend to this type of threat. Purely intrastate activities and things that have been traditionally described as falling within the second category, and thus properly regulated by Congress, involve activities or things that constitute a *direct* threat to the free flow of interstate commerce as evidenced by either the inclusion of a jurisdictional nexus element in the statute at issue or some statutory presumption. *See, e.g., Lopez*, 514 U.S. at 557-58 (citing federal statutes criminalizing the destruction of aircraft "used, operated, or employed in interstate . . . commerce"). While an intrastate transfer or possession of an assault weapon certainly indirectly impacts interstate commerce, the second category, if it is to have any meaning at all, simply cannot be read to contemplate the regulation of such activities. *See Kenney*, 91 F.3d at 890 ("Permitting unregulated intrastate possessions and transfers of machine guns instead indirectly undermines, via a market theory, the effectiveness of the federal attempt to regulate interstate commerce in machine guns."). To conclude otherwise would, in effect, permit Congress to legislate pursuant to its Commerce Clause power in an unrestricted manner with absolutely no assurance that the resulting federal regulation, in fact, regulates persons or things in interstate commerce.

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commerce. *See Lopez*, 514 U.S. at 559 ("[Section] 922(q) is not . . . an attempt to prohibit the interstate transportation of a commodity through the channels of commerce.") .

3. *Regulation of Activities that Have a Substantial Affect on Interstate Commerce*

Having determined that the assault weapon ban does not fit completely within either of the first two categories identified in *Lopez* and *Perez*, the constitutionality of § 922(v)(1) must rest on whether the prohibited activity substantially affects 27 interstate commerce. The analysis employed by the Supreme Court in *Lopez* in concluding that the possession of a handgun within one thousand feet of a school did not substantially affect interstate commerce is instructive on this issue. The Supreme Court's conclusion in *Lopez* rested on three points: (1) S 922(q) regulated neither a commercial activity nor an essential part of a larger regulation of commercial activity; (2) the statute did not contain a jurisdictional element to ensure on a case-by-case basis that the firearm in question was connected with interstate commerce; and (3) the government failed to provide a convincing explanation, supported by either legislative findings or argument presented to the Court, that the prohibited activity had a substantial affect on interstate commerce without 'pil[ing) inference upon inference." *Lopez*, 514 U.S. at 559-67. While the Court found that the statute failed to satisfy all of these considerations, it did not assign the relative weights to be afforded each of these factors. The Court left unclear whether a statute must satisfy all three of the *Lopez* considerations to be constitutional or whether it simply needs to satisfy one of them. In *United States v. Wall*, the Court of Appeals for the Sixth Circuit considered a constitutional challenge to 18 U.S.C. S 1955, which criminalizes illegal gambling operations of a certain size. 92 F.3d 1444 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 690 (1997). In an opinion concurring in part and dissenting in part

with the Court of Appeals' determination that this statute was constitutional, Judge Boggs presented a cogent analysis demonstrating the interaction of the factors shaping the court's conclusion in *Lopez* that possession of a firearm within one thousand feet of a school did not substantially affect interstate commerce. It is the conclusion of this court that Judge Boggs' analysis permits a court to undertake the serious judicial review of Commerce Clause measures contemplated by *Lopez* when purely intrastate activities are potentially regulated by federal legislation. Judge Boggs explained that the factors identified by the Court in *Lopez* should be considered in the following manner:

> First, a reviewing court should determine whether the intrastate activity being regulated is commercial in nature or its regulation is an essential part of the regulation of some commercial activity. If the activity is neither commercial nor is its regulation an essential part of the regulation of commercial activity, then that activity cannot be regulated under the Commerce Clause. If the intrastate activity is either commercial or its regulation is necessary to the regulation of a commercial activity, however, then a reviewing court needs to go on to the next question.
>
> Second, that court must ask whether the statute contains a jurisdictional nexus requirement that limits jurisdiction over the intrastate activity generally to those instances of the activity that have some particular with interstate commerce. If a facial challenge is mounted to the constitutionality of a statute with a jurisdictional nexus requirement, then this challenge must be rejected . . . If a statute contains a jurisdictional

> nexus requirement and the challenge is to the application of that requirement in a particular case, or the statute contains no jurisdictional nexus requirement, then the court 'must go on to the final question.
>
> Third, the court must ask whether the statute's constitutionality or the constitutionality of its application in a particular case is supported by (1) the findings in the statute or the legislative history of the statute; (2) by the litigant's proffered defenses of the constitutionality of the statute; or, (3) by the court's own attribution of congressional purpose to the statute. . . . The rationales offered to support the constitutionality of the statute . . . must have a logical stopping point that, would prevent them from being used to regulate any intrastate activity.

Id. at 1462 (Boggs, J. concurring in part and dissenting in part). Applying Judge Boggs's framework to the instant case clearly demonstrates that the prohibited conduct at issue in § 922(v)(1) has a substantial effect on interstate commerce, and therefore, § 922(v)(1) constitutes a constitutional exercise of Congress's authority to legislate pursuant to the Commerce Clause. First, the regulation of the intrastate activity covered in § 922(v)(1) constitutes an essential part of the regulation of a commercial activity. Section 922(v)(1) prohibits the manufacture, transfer, or possession of a semiautomatic assault weapon and as stated, the prohibited conduct extends to purely intrastate activity. Regulation of the intrastate manufacture, transfer, and possession of semiautomatic assault weapons is essential to Congress's regulation of this same conduct on an interstate level. In *Kenney*, the Court of Appeals for the Seventh Circuit

analogized the regulation of purely intrastate possession and transfers of machine guns to the intrastate production and consumption of wheat in *Wickard*. Just as the regulation of local production and consumption of wheat in *Wickard* was essential to controlling the volume of wheat moving in interstate and foreign commerce, the regulation of the intrastate manufacture, transfer, and possession of semiautomatic assault weapons is essential to the congressional regulation of these activities on an interstate level. Preventing Congress from reaching intrastate activities would essentially render congressional efforts to regulate the market in semiautomatic assault weapons ineffective given the national market for these weapons. Indeed, the prohibition of the transfer, manufacture, or possession on a national level where interstate commerce is directly impacted would prove to be of little good in the absence of local control over these same activities where interstate commerce is indirectly, though substantially, affected. Because § 922(v)(1) does not contain a jurisdictional nexus element, it is necessary to proceed to the third inquiry in Judge Boggs's framework. Upon conducting this third inquiry, the court finds that the statute's constitutionality is supported by congressional findings and legislative history. In making this inquiry, the court notes that it is not confined to simply examining congressional findings and legislative history of the statute at issue in circumstances where congressional legislation in a particular area has been historically pervasive. The subject matter of § 922(v)(1) is sufficiently similar to the subject matter of other federal firearms legislation which is accompanied by explicit congressional findings and legislative history so as to render the findings and history accompanying the other statutes a reliable statement of the rational for Congress's authority to enact § 922(v)(1). *See Rybar*, 103 F.3d at 279 (reaching the

same conclusion with respect to S 922(o)); *Kenney*, 91 F.3d at 890 (same).

In *Lopez*, the Court refused to defer to the institutional expertise accumulated by Congress in the area of regulating firearms regulation because 'prior federal enactments or Congressional findings [did not] speak to the subject matter of section 922(q) or its relationship to interstate commerce.' *Lopez*, 514 U.S. at 563 (quoting the Court of Appeals for the Fifth Circuit's opinion in *United States v. Lopez*, 2 F.3d 1342, 1366 (5th Cir. 1993)). The Court reasoned that § 922(q) "plow(ed] thoroughly new ground and represented a sharp break with the long-standing pattern of federal firearms legislation." The Court made no mention of whether it was appropriate to consider prior findings and legislative history when Congress re-plows old ground, as was done with § 922(v)(1). However, as Justice Powell's concurrence in *Fullilove* makes clear, deference to Congress is appropriate "[a]fter Congress has legislated repeatedly in an area of national concern." *Fullilove*, 448 U.S. at 503. In circumstances where deference to Congress is appropriate, it is reasonable and, in fact, essential to consider prior findings and legislative history to demonstrate that Congress recognizes that a particular regulated activity substantially affects interstate commerce. To conclude otherwise would require Congress to include either express findings with every piece of legislation enacted pursuant to its Commerce Clause power or for Congress to include a jurisdictional nexus element with every such piece of legislation-two requirements that have been explicitly rejected by the Supreme Court. *See supra*, pp. 13-17.

For nearly six decades, Congress has enacted federal legislation regulating firearms pursuant to its authority under the Commerce Clause. In 1938, Congress enacted the Federal

Firearms Act of 1938, Pub. L. No. 785, 52 Stat. 1250 (1938), which was defined as "An Act to regulate commerce in firearms," and applied to all firearms and prohibited various transfers of firearms by licensed as well as unlicensed dealers "in interstate or foreign commerce." This statute prohibited "any manufacturer or dealer" not specifically licensed pursuant to that statute from transporting, shipping, or receiving any firearm or ammunition "in interstate or foreign commerce' and made it unlawful for "any person' to receive firearms or ammunition that was "transported or shipped in interstate or foreign commerce" in violation of the licensing requirement.

The 1938 Act, in conjunction with the National Firearms Act of 1934 which regulated firearms pursuant to Congress's taxing power under Article I, Section 8, Clause 2 of the Constitution, remained in force and otherwise unchanged for the next three decades. In June 1968, Congress enacted the omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968) ("Omnibus Act"). As explained in the Court of Appeals opinion in *Lopez*, Title IV of Pub. L. 90-351 repealed the Federal Firearms Act and enacted a new chapter 44 of Title 18 (1.8 U.S.C. SS 921-28) which incorporated, with some amendments, nearly all of the provisions of the Federal Firearms Act and included additional firearms offenses. *Lopez*, 2 F.3d at 1350-52.

This legislation required a federal license "for any person . . . to engage in the business of importing, manufacturing, or dealing in firearms, or ammunition" regardless of whether the transaction operated in interstate commerce. The relevant committee report and express findings included in the Omnibus Act clearly demonstrate that this legislation was based on a congressional finding of an extensive interstate commerce in firearms and the inadequacy of state control at a local level over

the difficulties this presented.

The Omnibus Act contains the following express congressional findings:

> [T]here is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce, and...the existing Federal controls over such traffic do not adequately enable the States to control this traffic within their own borders through the exercise of their police power; . . . .
>
> [T]he ease with which any person can acquire firearms is a significant factor in the prevalence of lawlessness and violent crime in the United States; . . .
>
> [O]nly through adequate Federal Control over interstate and foreign commerce in these weapons, and over all persons engaging in the business of importing, manufacturing, or dealing in them, can this grave problem be properly dealt with, and effective State and local regulation of this traffic be made possible;
>
> . . . .
>
> [T]he lack of adequate federal control over interstate and foreign commerce in highly destructive weapons . . . has allowed such weapons and devices to fall into the hands of lawless persons. . . . thus creating a problem of national concern.

82 Stat. at 225-26 (1968).

Congress expanded and strengthened federal restrictions on firearms that same year through the passage of the Gun

Control Act of 1968, which superseded previous firearms legislation through the following measures: (1) implementing restrictions similar to those Congress had already applied to handguns to most transactions involving rifles and shotguns; (2) adding broader coverage of transactions in ammunition; (3) tightening restrictions on deliveries and sales of heavy firearms, including machine guns; and (4) prohibiting interstate movement of firearms by or to unlawful drug users or adjudicated mental defectives. Pub. L. No. 90-618, 90t Cong., 2d Sess., 82 Stat. 1213, 1218-21 (1968).

As with the Omnibus Act, the legislative findings accompanying the Gun Control Act clearly demonstrate the connection between the increasing crime rates, the increasing prevalence in the use of firearms, and the trafficking of firearms through interstate commerce. The House Report stated:

> The principal purpose of H.R. 17735, as amended, is to strengthen Federal controls over interstate and foreign commerce in firearms and to assist the States effectively to regulate firearms traffic within their borders.
>
> ....
>
> The increasing rate of crime and lawlessness and the growing use of firearms in violent crime clearly attest to a need to strengthen Federal regulation of interstate firearms traffic.
>
> The subject legislation responds to widespread national concern that existing Federal control over the sale and shipment of firearms [across] State lines is grossly inadequate.

> Handguns, rifles, and shotguns have been the chosen means to execute three-quarters of a million people in the United States since 1900. The use of firearms in violent crimes continues to increase today. Statistics indicate that 50 lives are destroyed by firearms each day. In the 13 months ending in September 1967 guns were involved in more than 6,500 murders, 10,000 suicides, 2,600 accidental deaths, 43,500 aggravated assaults and 50,000 robberies. No civilized society can ignore the malignancy which this senseless slaughter reflects.
>
> H.R. 17735, as amended, builds substantially on the regulatory framework contained in Title IV of the Omnibus Crime Control and Safe Streets Act of 1968.

H.R. Rep. No. 1577, 90th Cong., 2d Sess. 6-7 (1968).

The House Report also attaches a letter from the Attorney General stating that:

> By recognizing the Federal responsibility to control the indiscriminate flow of firearms and ammunition across State borders, this bill will give States and local communities the capacity and the incentive to enforce effectively their own gun control laws. Once enacted into law, it will insure that strong local or State laws are not subverted by a deadly interstate traffic in firearms and ammunition.

Id. at 19.

The enactment of the § 922(v)(1) represented the next logical step by Congress in its efforts to eradicate the dangers associated with the national market for certain firearms. H.R. 4296, the House Report accompanying the 1994 assault weapons legislation, summarized a series of hearings conducted over a five year period detailing the problems presented to the nation by semiautomatic assault weapons. H.R. Rep. No. 489, 103d Cong., 2d Sess. 13-20 (1994). During the hearings summarized in the House Report, witnesses offered extensive testimony on the increasing use of semiautomatic assault weapons and the inability of States to appropriately address this problem. *Id.* at 14-15. *See, e.g.*, Hearing on H.R. 4296 and R.R. 3527, Public Safety and Recreational Firearms Use Protection Act, House of Representatives, Committee on the Judiciary, Subcommittee on Crime and Criminal Justice, April 25, 1994 (statements of various witnesses). It is evident from the House Report's substantial reference to these hearings that in enacting the ban on the transfer, manufacture, and possession of semiautomatic assault weapons that Congress recognized that regulation on a national level would be ineffective in the absence of Congress's ability to reach this activity on a local, intrastate level because of the substantial affect of this activity on interstate commerce. *See, e.g.*, Hearing on H.R. 4296 and H.R. 3527, Public Safety and Recreational Firearms Use Protection Act, House of Representatives, Committee on the Judiciary, Subcommittee on Crime and Criminal Justice, April 25, 1994 (statement of Representative Charles Schumer) ("A number of states and cities have already banned [semiautomatic assault weapons] . . . . And these state laws will never be effective without a national ban.") ; *id.* (statement of John Magaw, Director cf the Department of Treasury, Bureau of Alcohol, Tobacco, and Firearms) ("[The] statistics and cases .

. . demonstrate the proliferation of semiautomatic assault weapons that are used by criminals against law-abiding citizens and law enforcement officers."). *See also* Hearing on the Need for a national Assault Weapons Ban, Senate Judiciary Committee, August 3, 1998 (statement of Jim Florio, Governor of New Jersey) ("[N]o individual state's law, no matter how strong, can stop the deadly flow of assault weapons across state lines.").

The Supreme Court has recognized that Congress enacted federal firearms legislation because "it was concerned with the widespread traffic in firearms." *Huddleston v. United States*, 415 U.S. 814, 824 (1974). Because local manufacture, transfer, and possession of semiautomatic assault weapons is so closely related to the interstate market for these weapons, such transfer, manufacture, and possession has a substantial affect on interstate commerce when viewed in the aggregate and cannot truly be considered purely local. *Kenney*, 91 F.3d at 891. *See also Wickard*, 317 U.S. at 125. As the Court of Appeals for the Third Circuit explained in *Rybar*, the regulation contemplated by § 922(v)(1), like the ban on the possession and transfer of machine guns, targets the transfer, manufacture, and possession of assault weapons "as a demand-side measure to lessen the stimulus that prospective acquisition would have on the commerce,, in semiautomatic assault weapons. *Rybar*, 103 F.3d at 283. The prohibition of the manufacture, transfer, and possession of semiautomatic assault weapons constitutes a rational means to eradicate the substantial and detrimental impact these weapons have on our nation. Accordingly, it is the conclusion of this court that Congress did not exceed its authority to legislate pursuant to the Commerce clause in enacting § 922(v)(1).

IV *Whether § 921(a)(30)(A)(viii) and (ix) Constitutes an Unconstitutional Bill of Attainder*

Plaintiffs assert that § 922(a)(30)(A)(viii) and (ix), when read in conjunction with § 922(v)(1), constitutes a bill of attainder in violation of Article I, Section 9, Clause 3 of the Constitution ('No Bill of Attainder . . . Law shall be passed.'). As stated, § 922(v)(1) makes it unlawful to "manufacture, transfer, and possess a semiautomatic assault weapon." Section 921 (a) (30) (A) (viii) and (ix) define the term semiautomatic assault weapon" as including the "INTRATEC TEC 9, TEC-DC and TEC22" and "revolving cylinder shotguns, such as (or similar to) the Street Sweeper and Striker 12." Plaintiffs submit that the reference to "INTRATEC TEC 9, TEC-DC and TEC-22" is to products manufactured by plaintiff Intratec and the reference to the "Striker 12" is to a product manufactured by plaintiff Penn Arms. Plaintiffs contend that the weapon-specific nature of § 921(a)(30)(A)(viii) and (ix) and the alleged punitive effects of the statute demonstrate that this statute is an unconstitutional bill of attainder.

In essence, a bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977). *See also United States v. Lovett*, 328 U.S. 303, 315 (1946). When the prior activity of an identifiable person or group serves as "a point of reference for the ascertainment of particular persons ineluctably designated by the legislature" for punishment, the statute at issue may be an attainder. *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 87 (1961). The Bill of Attainder Clause prohibits the legislature from assuming judicial

functions and conducting trials and reflects "the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon specific persons." *United States v. Brown*, 381 U.S. 437, 445 (1965). Indeed, as the Supreme Court explained in *Brown*, the prohibition against bills of attainder is bound up in the principle of separation of powers. *Id.* at 445-46.

"[O]nly the clearest proof [can] suffice to establish the unconstitutionality of a statute" on the ground that it is a bill of attainder. Communist Party, 367 U.S. at 83 (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)). The examination of whether a particular legislative action constitutes a bill of attainder necessarily requires consideration of two separate criteria: specificity in classification and punishment. *See Nixon*, 433 U.S. at 470 (describing these criteria as "the anchor that ties the bill of attainder guarantee to realistic conceptions"). *See also BellSouth Corp. v. FCC*, 144 F.3d 58, 62 (D.C. Cir. 1998) (noting that a Bill of Attainder "is a prohibition triggered when a legislative act meets two tests-first, that it apply with specificity, and second, that it imposes punishment"). While it cannot be disputed that § 921(a)(30)(A)(viii) and (ix) specifically prohibits the manufacture of the semiautomatic assault weapons produced by plaintiffs, "(a]n otherwise valid law is not transformed into a bill of attainder merely because it regulates conduct on the part of designated individuals or classes of individuals." *Fresno Rifle ILPistol Club Inc. v. Van De Kamp*, 965 F.2d 723, 727 (9th Cir. 1992). "Legislatures may act to curb behavior which they regard as harmful to the public welfare, whether that conduct is found to be engaged in by many persons or by one." *Communist Party*, 367 U.S. at 88.

1. *The Specificity Element*

In *Nixon v. Administrator of General Services*, the Supreme Court specifically rejected the position that legislation singling out a specific group or individual by name necessarily constituted a bill of attainder. The statute at issue in *Nixon*, the Presidential Recordings and Materials Preservation Act, was challenged as an unconstitutional bill of attainder because it directed the Administrator of General Services to take custody of the Presidential papers and tape recordings of former President Richard Nixon. 443 U.S. at 429. The Supreme Court determined that 'the fact that [the Act] refers to [President Nixon] by name does not automatically offend the Bill of Attainder Clause." *Id.* at 472. The Court's determination was based, in part, upon the notion that "[h]owever expansive the prohibition against bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine, invalidating every Act of Congress . . . that legislatively burdens some persons or groups but not all other plausible individuals.' *Id.* at 472.

The Court's reference in *Nixon* to *United States v. Brown* is also instructive in this regard. In *Brown*, the Court distinguished the Labor Management Disclosure Act of 1959, which made it a crime for a member of the Communist Party to serve as an officer or as an employee of a labor union and was held to be an unconstitutional bill of attainder, from a provision in the Banking Act of 1933, which disqualified identifiable members of a group of officers and employees from serving as officers of Federal Reserve Banks. 381 U.S. at 453-54. The Court reasoned that the latter piece of legislation did not constitute a bill of attainder despite the fact that it prohibited conduct on the part of designated individuals or classes of

individuals. In sum, as the Court succinctly stated in *Nixon*, "specificity of the law [alone] does not call into play the Bill of Attainder clause." *Nixon*, 433 U.S. at 471 n.33.

The conclusions reached by the Court in *Nixon* and *Brown* make it abundantly clear that the prohibition of the transfer, manufacture, and production of certain semiautomatic assault weapons specifically by name does not render § 921(a)(30)(A)(viii) and (ix) a bill of attainder. Additional firearms, beyond those specifically identified in the statute, may also be deemed semiautomatic assault weapons within the definition of "semiautomatic assault weapon" contained in 921(a)(30)(B), (C), and (D). It is significant that the statute "casts a wider net" and it is the conclusion of this court that it was not the intent of Congress to punish specific individuals-in this case Navegar and Penn Arms-but rather, it was to regulate certain types of firearms. *See Fresno Rifle and Pistol Club*, 965 F.2d at 728.

2. *The Punishment Element*

Having concluded that the inclusion of a weapon-specific prohibition alone does not carry the day for plaintiffs, the second criterion must be considered. In order to succeed in their challenge to the constitutionality of the statute, plaintiffs must demonstrate that the statute at issue "'inflicted punishment' within the constitutional proscription against bills of attainder." *Nixon*, 433 U.S. at 472-73 (quoting *Lovett*, 328 U.S. at 315). *See also Selective Sery, Sys, v. Minnesota Pub, Interest Research Group*, 468 U.S. 841, 852 (1984) ("The proscription against bills of attainder reaches only statutes that inflict punishment on the specified individual or group."); *Brown*, 381 U.S. at 456-60; *Cummings v. Missouri*, 71 U.S. (4

Wall.) 277, 320 (1866).

In considering whether a statute inflicts punishment within the constitutional proscription of bills of attainder, three inquiries must be made:

> (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record "evinces a[n] . . . intent to punish.'

Selective Service Sys., 468 U.S. at 852 (quoting *Nixon*, 433 U.S. at 473). Consideration of these factors must establish that the statute at issue imposes more than merely "burdensome consequences." *Nixon*, 433 U.S. at 472. Upon inquiry into the three components of punishment, this court concludes that plaintiffs are unable to establish that they have suffered impermissible punishment with the proscriptions of the Bill of Attainder Clause.

a. *The Historical Meaning of Legislative Punishment*

Traditionally, bills of attainder have often imposed a penalty of death with lesser punishments imposed by bills of pains and penalties. *Cummings*, 71 U.S. (4 Wall.) at 323. The Supreme Court has explained that the "Constitution proscribes [the] lesser penalties [including those imposed by bills of pains and penalties) as well as those imposing death." *Selective Service Sys.* 468 U.S. at 852. *See also BellSouth*, 144 F.3d at 62 (noting that "[a]s early as 1810 . . . in *Fletcher v. Peck* . . .

Chief Justice Marshall noted in dictum that the prohibition on bills of attainder ought to extend to legislation subjecting specified persons to penalties short of death-what the framers called 'bills of pains and penalties.'").

Throughout history, the list of punishments proscribed by the Bill of Attainder Clause "has expanded to include legislative bars to participation by individuals or groups in specific employments or professions." *Selective Service Sys.*, 468 U.S. at 852. As the Court of Appeals for the District of Columbia Circuit noted in *BellSouth*, "the Court's four major decisions invalidating statutes on Bill of Attainder Clause grounds have all involved legislation preventing specific classes of persons from pursuing certain occupations." *BellSouth*, 144 F.3d at 64. The first two cases, *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866) and *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866), struck down restrictions imposed immediately after the Civil War that prohibited individuals from holding certain employment if they either aided the Confederacy or if they refused to swear on oath that they never assisted the Confederacy during the Civil War. The second two cases, *United States v. Lovett*, 328 U.S. 303 (1946) and *United States v. Brown*, 381 U.S. 437 (1965), involved restrictions on members of the Communist Party during the Cold War that terminated the salaries of these members or prohibited them from serving as officers or employees of labor unions.

Although plaintiffs in the instant case argue that the restrictions imposed upon them by § 921(a)(30)(A)(viii) and (ix) impose burdens historically associated with punishment, this argument clearly without merit. Plaintiffs present no indication that their business is solely and completely linked to the production of the weapons identified by the statute at issue that they are unable to produce other firearms that are not made

unlawful by the statute. Although plaintiffs contend that if they were to violate § 922(v)(1) of the Act, then they would lose their licenses to manufacture any type of firearm, the decision to violate § 922(v)(1) and thereby incur the accompanying criminal penalty is theirs alone. Plaintiffs have not been denied the ability to participate in a specified field of employment or a particular vocation and therefore, the type of economic burden imposed on plaintiffs in terms of financial loss, *see Navegar*, 914 F. Supp. at 633-35 (discussing financial impact on plaintiffs), does not rise to the level of punishment traditionally proscribed by the Bill of Attainder Clause. *Fresno Rifle & Pistol Club*, 965 F.2d at 728 (reaching the same conclusion with respect to a bill of attainder challenge to portions of a California statute prohibiting the manufacture, transfer, or possession of certain firearms by name).

b. *Furtherance of Nonpunitive Legislative Purposes*

The second inquiry which must be conducted requires a reviewing court employ a functional test to determine whether the challenged legislation, in light of the types and severity of the burdens it imposes, can reasonably be said to further nonpunitive legislative purposes. *BellSouth*, 144 F.3d at 65. *See also Nixon*, 433 U.S. at 475-76. The Supreme Court has explained that even though a particular burden may not traditionally be considered to fall within those proscribed by the Bill of Attainder Clause, the second inquiry is essential. 'To ensure that the Legislature has not created an impermissible penalty not previously held to be within the proscription against bills of attainder, we must determine whether the challenged statute can be reasonably said to further nonpunitive goals."

Selective Service Sys., 468 U.S. at 853-54. *See also BellSouth*, 144 F.3d at 65 ("[Tlhe second factor prevents Congress from circumventing the clause by cooking up newfangled ways to punish disfavored individuals or groups.") . The Court of Appeals for the District of Columbia Circuit has commented on the importance of this factor by stating that "[t]he line of Supreme Court law on the Bill of Attainder Clause indicates that legislation will survive Bill of Attainder attack if the statute furthers nonpunitive legislative purposes." *Siegel v. Lyna*, 851 F.2d 412, 418 (D.C. Cir. 1988).

In order to establish that § 921(a)(30)(A)(viii) and (ix) serves only punitive purposes, plaintiffs must demonstrate that there no legitimate legislative purposes are apparent, for it is only in such instances that "it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers." *Nixon*, 433 U.S. at 476. Plaintiffs are simply unable to meet this burden in the instant case. Section 921(a)(30)(A)(viii) and (ix) is an intricate part of federal legislation designed to eradicate the serious threat to the safety and health of the nation by semiautomatic assault weapons. *See* H.R. Rep. No. 489 at 12 ("The threat posed by criminals and mentally deranged individuals armed with semiautomatic assault weapons has been tragically widespread. . . . [T]he use of semiautomatic assault weapons . . . continues to grow. H.R. 4296 will restrict the availability of such weapons in the future.") . As discussed previously, the House Report accompanying the bill that became the statute at issue included references to extensive testimony offered to the Subcommittee on crime and criminal Justice detailing the devastating violence wrought by semiautomatic assault weapons. *See* H.R. Rep. No. 489 at 13-19. The congressional findings and legislative history accompanying other closely

related federal firearms regulations further bolster the conclusion that a nonpunitive legislative purpose for § 921(a)(30)(A)(viii) and (ix) exists and "legitimate justifications for passage of the Act are readily apparent." *Nixon*, 433 U.S. at 476. Furthermore, in light of the evidence before the court, it would be unreasonable to conclude that the statute at issue "rests upon a congressional determination of blameworthiness and a desire to punish [plaintiffs]." *Id.* at 476. *See also Springfield Armory, Inc. v. City of Columbus*, 805 F. Supp. 489, 495 (S.D. Ohio 1992) (considering a challenge to a weapon-specific firearm ban by the city of Columbus and concluding that "as a matter of law the ordinance, on its face, was designed to serve a nonpunitive purpose, namely, the protection of the people of Columbus from the perceived danger posed by certain firearms"). Accordingly, it is the conclusion of this court that the nonpunitive purposes of the statute clearly outweigh the burdens imposed on plaintiffs.[8]

C. *The Motivational Test*

The final inquiry to be conducted requires the court to determine "whether the legislative record evinces a

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[8] In their opposition to the government's motion for summary judgment, plaintiffs contend the government's arguments with respect to the second inquiry are belied by the fact that certain firearms are exempted from coverage under § 922(v)(1). This argument is of little assistance to plaintiffs. As stated by the Supreme Court in *Nixon*, the prohibition against bills of attainder is not a substitute for equal protection. *See Nixon*, 433 U.S. at 471 ("However expansive the prohibition against bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine.").

congressional intent to punish." *Nixon*, 433 U.S. at 478. In *BellSouth*, the Court of Appeals noted that the third inquiry is closely linked to the second inquiry and "in practice appears to differ from the second only in inviting a journey through legislative history." *BellSouth*, 144 F.3d at 67.

Plaintiffs' arguments with respect to this inquiry can be disposed of quickly as plaintiffs have failed to present the type of "unmistakable evidence of punitive intent which . . . is required before a Congressional enactment of this kind may be struck down." *Selective Service Sys.*, 468 U.S. at 855-56 (quoting *Flemming*, 363 U.S. at 619). Unlike the Communist Party members in *Brown* who established that the statute at issue in that case, which prevented them from occupying the position of officers or employees in labor unions, intended to "inflict [ ] deprivations on . . . blameworthy or tainted individual[s] in order to prevent [their] future conduct," *Nixon*, 433 U.S. at 476 (discussing the holding in *Brown*), plaintiffs have failed to make any similar showing in this case. Plaintiffs' bare assertions also stand in stark contrast to the House Report accompanying the statute struck down in *Lovett* which expressly characterized individuals as 'subversive . . . and . . . unfit . . . to continue in Government employment." H.R. Rep. No. 448, 78th Cong., 1st Sess. 6 (1943).

The court's independent evaluation of the legislative record accompanying both the Violent Crime Control and Law Enforcement Act and prior federal firearms legislation eliminates any notion that Congress intended to punish plaintiffs in enacting 921(a) (30) (A) (viii) and (ix) "[T]he decided absence from the legislative history of any congressional sentiments expressive of this purpose is probative of nonpunitive intentions and largely undercuts [the] major concern[s] that prompted the bill of attainder prohibition."

Nixon, 433 U.S. at 480.

In sum, because the challenged statute does not fall within the historical meaning of legislative punishment, furthers nonpunitive legislative purposes, and fails to evince any congressional intent to punish, it is the conclusion of this court that § 921(a)(30)(A)(viii) and (ix) is not a bill of attainder with respect to plaintiffs in this case.

V. *Conclusion*

For the reasons set forth herein, it is the conclusion of this court that Congress did not exceed its authority under the Commerce Clause in enacting § 922(v)(1) and the court also finds that § 921(a)(30)(A)(viii) and (ix), when read in conjunction with § 922(v)(1), is not a bill of attainder with respect to plaintiffs in this case. Accordingly, defendant's motion for summary judgment is granted and plaintiffs' motion for summary judgment is denied. This case stands dismissed with prejudice.

A separate order shall issue this date.

Royce C. Lamberth
United States District Judge

Date:8-31-98

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed January 25, 2000

No. 98-5491

NAVEGAR, INCORPORATED, *D/B/A* INTRATEC,

AND

PENN ARMS, INCORPORATED,

APPELLANTS

v.

UNITED STATES OF AMERICA,

APPELLEE

Before: EDWARDS, *Chief Judge*, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, and GARLAND, *Circuit Judges*.[1]

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[1] *Circuit Judge* Sentelle would grant the petition for rehearing en banc. His opinion is attached.

ORDER

Appellants' petition for rehearing en banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED by the Court that appellants' petition is denied.

Per curiam
For the Court:
Mark J. Langer, Clerk

Sentelle, *Circuit Judge*, dissenting from the denial of petition for rehearing *en banc*: By denying *en banc* review of the panel opinion, *Navegar, Inc. v. United States*, 192 F.3d 1050 (D.C. Cir. 1999), this court perpetuates an approach to Commerce Clause jurisprudence hopelessly out of date under contemporary Supreme Court interpretations of the Constitution.

In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court carefully delineated limitations on the authority of the federal government to act under that enumerated power. In his opinion for the five-Justice majority, Chief Justice Rehnquist identified "three broad categories of activity" within which the federal government may legitimately regulate under the commerce power. 514 U.S. at 558. These three categories are: (1) "the use of the channels of interstate commerce"; (2) the regulation and protection of "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "activities having a substantial relation to interstate commerce." *Id.* at 558-59 (citations omitted). Because the claimed justification for the statute before it, the Gun-Free School Zones Act, sheltered under the umbrella of the third area of activity, the Chief Justice wrote a further explication of "those activities that substantially affect interstate commerce." *Id.* at 559 (citing *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968)). Briefly, under *Lopez*, to be the subject of constitutionally valid regulation under the Commerce Clause, an activity not falling within categories 1 or 2 must *substantially* affect interstate commerce, not merely affect it. *Id.* at 559. To determine whether an activity substantially affects commerce, we undertake another tripartite examination, asking whether:

> --the regulation controls a commercial activity, or an activity necessary to the regulation of some commercial activity;
>
> --the statute includes a jurisdictional nexus requirement to ensure that each regulated instance of the activity affects interstate commerce; and
>
> --the rationale offered to support the constitutionality of the statute (*i.e.*, statutory findings, legislative history, arguments of counsel, or a reviewing court's own attribution of purposes to the statute being challenged) has a logical stopping point so that the rationale is not so broad as to regulate on a similar basis all human endeavors, especially those traditionally regulated by the states.

National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1064 (D.C. Cir. 1997) (Sentelle, J., dissenting) (analyzing *Lopez*, 514 U.S. at 559-65, and citing *United States v. Wall*, 92 F.3d 1444, 1455-56 (6th Cir. 1996) (Boggs, J., dissenting in part)).

In *Lopez*, the Court considered the constitutionality of a statute in which Congress had made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(1)(A) (Supp. V 1993). The only justification the United States could offer among the enumerated powers for the constitutionality of the statute was the Commerce Clause. Unsurprisingly, the Court held that the

Gun-Free School Zones Act fit none of those three subcategories. First, it did not regulate or control a commercial activity or an activity necessary to the regulation of a commercial activity. The Chief Justice acknowledged that *Wickard v. Filburn*, 317 U.S. 111 (1942), relied on by the panel in *Navegar*, 192 F.3d at 1056-57, had upheld federal regulation of home consumption of wheat, where it affected interstate commerce, but described that decision as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity." *Lopez*, 514 U.S. at 560. The *Lopez* Court further recognized that at least the statute before the Court in *Wickard* involved the regulation of the wheat market--interstate commerce. *Id.* at 560-61. In the view of the Congress, and subsequently the Court of that time, the regulation of consumable wheat, wherever grown, was necessary to control the volume of wheat on that interstate market. The Gun-Free School Zones Act neither controlled nor purported to affect any market at all.

Second, the statute included no jurisdictional nexus. Under this element of examination, the Chief Justice compared *United States v. Bass*, 404 U.S. 336 (1971), in which the Court had upheld the statute making it a crime for a felon "to receive, possess, or transport in commerce or affecting commerce ... any firearm." *Lopez*, 514 U.S. at 561-62 (quoting *Bass*, 404 U.S. at 337 (brackets omitted)). The Chief Justice noted that in upholding that statute the Court had expressly reserved the question of whether Congress could constitutionally regulate the "mere possession" of firearms without the jurisdictional nexus. *Id.* at 562 (quoting *Bass*, 404 U.S. at 339 n.4). Even in *Bass*, where the statute had withstood constitutional scrutiny, the Court set aside the conviction before it because the prosecution, while having proved that the defendant possessed

a firearm, "failed 'to show the requisite nexus with interstate commerce.' " *Id.* (quoting *Bass*, 404 U.S. at 347). The statute the Court struck down in *Lopez* had no such jurisdictional requirement. Congress had invaded the state-owned territory of mere possession with no connection to interstate commerce.

Finally, the *Lopez* Court considered the implications of the government's argument that guns around schoolhouses might result in violent crime, and violent crime could be expected to affect the functioning of the national economy either through the mechanism of insurance or by reducing the willingness of individuals to travel to other parts of the country which they might consider unsafe. The Court highlighted the government's admission that, under this "costs of crime" reasoning, the federal government could regulate "not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Id.* at 564. Indeed, the federal government "could regulate any activity that [Congress] found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example." *Id.* In other words, under the government's theory of constitutionality for the Gun-Free School Zones Act, the words of the Commerce Clause were limitless, and Congress had the power to regulate anything at all. There was no stopping point. The statute was unconstitutional.

As appellants argue in petitioning for *en banc* review, the *Navegar* panel's decision in the present case is inconsistent with the Supreme Court's decision in *Lopez*. The *Navegar* panel had before it an appeal from a judgment denying a declaratory judgment declaring unconstitutional section 110102 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1996-98 (1994)

(codified at 18 U.S.C. ss 921(a)(30), 922(v) (1994)). The disputed section makes it unlawful to "manufacture, transfer, or possess a semiautomatic assault weapon." 18 U.S.C. § 922(v). In upholding that judgment and the constitutionality of the statute, the panel relied first on the 1942 jurisprudence of *Wickard v. Filburn*, and then on our decision in *Terry v. Reno*, 101 F.3d 1412, 1417 (D.C. Cir. 1996), which upheld the constitutionality of a statute protecting an area of commerce, specifically health clinics. *See Navegar*, 192 F.3d at 1056-57. *Reno* is not on point, but even if it were, the Supreme Court and not our precedent controls. Insofar as the Supreme Court's decision in *Wickard* retains any vitality after *Lopez*, it cannot control the ruling on the disputed statute. Despite the panel's pains to align this statute with those in *Reno* and *Wickard*, ultimately the statute is indistinguishable from that before the Court in *Lopez*. The panel laboriously attempts to fit this gun act into category 3 of the permissible areas of regulation under *Lopez*. To do so, it incorrectly paraphrases the *Lopez* holding. The *Lopez* Court did not, as the panel declares, "conclude[] that Congress had no rational basis for finding that gun possession in a school zone had a substantial effect on interstate commerce and declare[] the statute unconstitutional." *Navegar*, 192 F.3d at 1055 (citing *Lopez*, 514 U.S. at 567). Rather, the Court made an independent determination of the effect of the statute on interstate commerce, "ultimately a judicial rather than a legislative question," *Lopez*, 514 U.S. at 557 n.2. The Court concluded that gun possession did not have a substantial effect and declared the statute unconstitutional. As one of our sister circuits recognized, *Lopez* "elevated to a majority opinion statements from previous concurring opinions that 'simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily

make it so.'" *Brzonkala* v. *Virginia Polytechnic Inst. and State Univ.*, 169 F.3d 820, 855 (4th Cir. 1999) (en banc) (quoting *Lopez*, 514 U.S. at 557 n.2) (brackets and other citations omitted), *cert. granted sub nom. Brzonkala v. Morrison*, 120 S. Ct. 11 (1999).

This statute, like the parallel firearms act stricken as unconstitutional in *Lopez*, regulates, under purported authority drawn from Congress's power to regulate interstate commerce, activity (or inactivity) that is neither commerce nor interstate. The Supreme Court held the Gun-Free School Zones Act unconstitutional in *Lopez*. Our panel decision upholding this statute as constitutional cannot be reconciled with *Lopez*, and we should review it *en banc*.